United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2639

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P/S

To be argued by
IRA LEE SORKIN

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-2639

UNITED STATES OF AMERICA,
Appellee,

—v.—

MARTIN FRANK,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Martin Frank appeals from a judgment of conviction entered on December 6, 1974, in the United States District Court for the Southern District of New York, after a six-week trial before the Honorable Harold R. Tyler, Jr., United States District Judge, and a jury.*

A. Indictment 74 Cr. 159

Indictment 74 Cr. 159, filed on February 14, 1974, charged all the defendants in ten counts with conspiracy and substantive violations of the federal securities laws

* The indictment also named three other defendants, Philip Stoller, Jerome Allen and Alfred Herbert. Stoller was convicted on Counts One through Ten and Fourteen and Sixteen. He has not filed an appeal. Allen pleaded guilty to Count One of the Indictment on March 5, 1974. Herbert, a Swiss citizen, is a fugitive in Switzerland.

and mail fraud. Stoller alone was charged in six counts with making false statements.*

Count One charged all defendants and five co-conspirators with conspiracy to violate the federal securities laws and to commit mail fraud in connection with the offer, sale and after market trading of the common stock of Training With The Pros, Inc., in violation of Title 18, United States Code, Section 371. Count Two charged each of the defendants with fraud in the offer and sale of securities, and with aiding and abetting such fraud, in violation of Title 15, United States Code, Sections 77(q) and 77x and Title 18, United States Code, Section 2. Counts Three through Six charged all defendants with fraud in connection with the purchase and sale of securities, and with aiding and abetting such fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78(ff) and Title 18, United States Code, Section 2. Counts Seven through Ten charged all defendants with mail fraud, and with aiding and abetting such fraud in violation of Title 18, United States Code, Sections, 1341 and 2. Counts Eleven through Sixteen charged defendant Stoller with making false statements to the United States Securities and Exchange Commission in violation of Title 18, United States Code, Section 1001.

B. Indictment 74 Cr. 763

Indictment 74 Cr. 763, filed on August 1, 1974, charged the appellant and Stoller with obstruction of justice. Count One charged Frank and Stoller with attempting to influence and intimidate co-defendant Jerome Allen by offering Allen monies not to testify, in violation of Title 18, United States Code, Section 1503. Count Two charged Stoller with threatening Allen with physical harm if Allen testi-

* Indictment 74 Cr. 159 superseded Indictment 73 Cr. 1050 which charged Stoller with the same six counts of making false statements as charged in Indictment 74 Cr. 159.

fied for the government, in violation of Title 18, United States Code, Section 1503. Count Three charged Frank and Stoller with attempting to suborn Allen by getting Allen to sign a perjurious affidavit, in violation of Title 18, United States Code, Section 1503.

On August 29, 1974, upon motion of the government and without objection by Frank, Indictments 74 Cr. 159 and 74 Cr. 763 were consolidated for trial.

Trial commenced before Judge Tyler on September 4, 1974. At the close of the Government's case, Counts Eleven through Thirteen and Count Fifteen of Indictment 74 Cr. 159 and Indictment 74 Cr. 763 were dismissed upon motion of Stoller. On October 17, 1974, the jury found Stoller guilty on Counts One through Ten and Counts Fourteen and Sixteen, and Frank guilty on Count One.

On December 6, 1974, Judge Tyler sentenced Frank on Count One to a term of imprisonment of two years and fined him $2,500. Frank is at liberty pending his appeal.

Statement of Facts

A. Synopsis

The Government's evidence, presented through the testimony of twenty-nine witnesses and approximately two hundred exhibits, established that from June 1968 through June 1969, Frank, Stoller and their co-conspirators devised and carried out a massive scheme to acquire a large block of the offering of Training With The Pros, Inc. ("TWP"), common stock, deposit the shares in secret coded accounts at Bank Hofmann, Zurich, Switzerland, sell the shares to two other secret accounts controlled by Stoller and Allen and then "tout" the stock to brokers in the United States for the purpose of raising the market price

of TWP and thereby permit the accounts Stoller and Allen controlled to sell TWP stock at a profit.

In early 1968, TWP, then known as M & H Studios, Inc. ("M & H"), was a small private company engaged in the business of sales training programs. Elmer "Bud" Moss ("Moss"), the president and Marilyn Herzfeld ("Herzfeld"), Secretary-Treasurer controlled and ran the operations of the company from 41 West 86th Street, New York, New York.

In approximately February or March, 1968, Moss approached Ramon N. D'Onofrio ("D'Onofrio")* and asked if D'Onofrio would help underwrite a public offering of M & H common stock. D'Onofrio agreed and in approximately June or July, 1968, met with Stoller, Allen and Joseph Pfingst ("Pfingst") in Zurich, Switzerland, to explain the "deal" to them. At this meeting, it was agreed that D'Onofrio would arrange for the offering to be between 40,000 to 50,000 shares at $6 or $7 per share, and they would receive approximately 25,000 shares on the offering. It was then agreed that after the stock reached $50 per share they would "blow off" or sell the shares to Joseph Bonavia ("Bonavia") and Muir Weissinger ("Weissinger"), two accounts at Bank Hofmann controlled by Stoller and Allen. It was then agreed that they would then promote the stock to $60, $70 or $80 per share so that Bonavia and Weissinger could be "rescued", or in other words, so that Bonavia and Weissinger could sell the shares from their accounts at a profit. It also was agreed that they and Herbert who was employed by Bank Hofmann, would cause the bank to send an "indication

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* D'Onofrio's activities have been before this Court on two previous occasions. *United States* v. *Pfingst*, 477 F.2d 177 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973), and *United States* v. *Pfingst*, 490 F.2d 262 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974).

letter" to TWP indicating for 25,000 shares.* However, the stock would actually be funneled into each of the secret accounts of Stoller, Allen, D'Onofrio and Pfingst.

In early November, 1968, Stoller, Allen and D'Onofrio met with Frank, who advised them that they could not use an indication letter. Instead, Frank advised them to use nominees to acquire 15,000 shares rather than 25,000 shares, "buy" the stock back from the nominees at a nominal profit after the offering and then place the stock in their Swiss accounts. For this advice, Frank was promised $15,000 and 1,000 shares of TWP stock to be deposited in his secret account at Bank Hofmann.

After this meeting Stoller, Allen and D'Onofrio each designated five persons as their respective nominees. On February 7, 1969, when TWP went public, Stoller's five nominees received 1,000 shares each, Allen's five nominees received 1,000 shares each and four of D'Onofrio's nominees received 1,000 shares each and a fifth received 900 shares.

In late February, Stoller, Allen and D'Onofrio bought or took back the 14,900 shares from their respective nominees and Stoller and D'Onofrio transported the shares to Bank Hofmann, where Herbert placed the stock in the respective secret accounts of Stoller, Allen and D'Onofrio.

On March 11, 1969, when the stock reached a price of approximately $45-$50 per share, Herbert, on the instructions of Stoller and D'Onofrio, "crossed" or sold the stock from the secret accounts of Stoller, Allen and D'Onofrio to the secret accounts of Bonavia and Weissinger.

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* An "indication letter" in the context of this case refers to a letter sent to a corporation or underwriter offering securities by an individual who, by the terms of the letter, indicates that he is interested in purchasing securities on the offering.

At the time of the "cross," the shares were still registered in the names of the fifteen nominees of Stoller, Allen and D'Onofrio. In mid-March, after the "cross," Herbert sent the shares to the Lausanne, Switzerland, office of the broker-dealer firm of Emanuel Deetjen & Co. ("Deetjen") for the purpose of having the stock transferred into "street name". Deetjen refused to transfer the stock until Bank Hofmann proved that the bank owned the stock. Stoller, Allen and D'Onofrio then obtained receipts falsely representing that they purchased the stock from their respective nominees as well as receipts falsely representing that Stoller, Allen and D'Onofrio sold the stock to Bank Hofmann. Allen was unable to leave the United States with his receipts so Frank stamped Allen's receipts with his notary stamp. These receipts were then delivered to Herbert who transmitted them to Deetjen.

In approximately early April 1969, after Deetjen transferred the stock, Stoller and Allen touted the stock to several brokers in the United States for the purpose of raising the price of the stock and thereby permitting Bonavia and Weissinger to sell their stock at a profit.

On June 20, 1969, after the United States Securities and Exchange Commission ("SEC") began an investigation, Stoller testified falsely at the SEC concerning his knowledge of and participation in the underwriting and aftermarket of the TWP stock.*

Appellant's defense consisted primarily of attempts to establish that the government's principal witnesses, D'Onofrio and Bonavia, were testifying falsely; that no such meetings took place in Switzerland or Frank's office; that the nominees were used to acquire the stock in a lawful transaction; that the stock was never deposited in secret accounts but,

* An "after-market" refers to the trading in the securities sold to the public after the offering has been completed.

in fact, was sold to Bank Hofmann; and that the case was manufactured by the Government through trick, coercion and subornation of perjury.

B. The Government's Case

1. The Secret Coded Accounts At Bank Hofmann

In early 1968, Stoller asked D'Onofrio if D'Onofrio had thought of opening an account at Bank Hofmann. Stoller explained that as a preferred client of Bank Hofmann, D'Onofrio would not receive regular margin calls because Stoller and Allen knew a man at the Bank. Stoller also explained that the account would be secret, that he had such a secret account and that the account was used to evade income taxes and "run stocks" (Tr. 98-103).* D'Onofrio described the term, "run stocks", as a method of artificially boosting a stock to where it does not belong, *i.e.,* to an artificially high price, either by word of mouth or by taking stock off the market (Tr. 107). Stoller then had a conversation by telephone with Herbert in Zurich, where Stoller introduced D'Onofrio as a "new client". D'Onofrio then opened an account through Herbert at Bank Hofmann using the code name "Gypsy" (Tr. 103-7).

Stoller claimed he and Allen had approximately fifty to sixty other clients at Bank Hofmann. The arrangement with their clients was that if the clients made a profit through their accounts at the bank, Stoller and Allen would receive 10% of the profits (Tr. 106, 1483, 1495-6). In addition to these clients, Stoller had an account at Bank Hofmann, code

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* "Tr." refers to the trial transcript; "GX" refers to Government exhibit; "Br." refers to the appellant's Brief and "Frank X" or "Stoller X" refers to the exhibits introduced into evidence by the respective defendants.

name "Shirley", and Allen had an account, code name "Erika" (Tr. 117, 1501-4).

In May, 1968, when D'Onofrio learned of Stoller's and Allen's accounts, he also learned from Stoller of two clients of Stoller and Allen at Bank Hofmann, named Joseph Bonavia and Muir Weissinger. Stoller explained to D'Onofrio that Bonavia and Weissinger paid 10% of their profits to Stoller and Allen (Tr. 132, 134). The code names for the accounts of Bonavia and Weissinger were "Barbin" and "Pompeii", respectively (Tr. 133, 135, 1489, 1522).

On April 30, 1968, Bonavia opened his "Barbin" account at the urging of Stoller, who explained to him that Bonavia's full disclosure account at Bank Hofmann, opened in 1965, was very dangerous to Stoller because it disclosed what stocks Stoller and Allen were trading in (Tr. 1482-6; GX 53A-53C).

Frank's secret account at Bank Hofmann was identified as code name "Lance" (Tr. 153, 179).

2. Stoller, Allen, D'Onofrio And Pfingst Plan The Deal

In early 1968, M & H*, located at 41 West 86th Street, was a small private company engaged in sales training programs for vocational rehabilitation (Tr. 121, 1075, 1089). Elmer "Bud" Moss was the president and Marilyn Herzfeld was secretary-treasurer (GX 1). In February or March 1968, Moss asked D'Onofrio if D'Onofrio would help Moss underwrite M & H. D'Onofrio agreed to help Moss and arranged to have Pfingst, who was then an attorney representing the firm D'Onofrio worked for and also D'Onofrio's former partner in a dairy, represent the

* In the fall of 1968 M & H changed its name to TWP.

company in the underwriting (Tr. 121-7). The Regulation A notification, which was prepared by D'Onofrio, Pfingst, Moss and Herzfeld, was filed with the SEC on October 25, 1968 (Tr. 128; GX 1A).

In approximately June or July, 1968, D'Onofrio went to Switzerland with Stoller, Allen, Pfingst and others (Tr. 135; Stoller X H). During the flight Pfingst and D'Onofrio agreed that they should talk to Stoller and Allen about TWP even though Stoller was concentrating on closing another deal and would not think of another deal while one was already in the "hopper". D'Onofrio also felt that since he was a promoter and manipulator, Stoller and Allen would not listen to him because it would be one con-man conning another con-man. It was agreed that Pfingst would bring up the subject of TWP and D'Onofrio would act as if he did not know Pfingst was going to bring up the subject (Tr. 135-40).

Upon arriving in Switzerland, D'Onofrio, Pfingst, Stoller and Allen met at the Baur Au Lac Hotel in Zurich. At this meeting Pfingst asked if Stoller and Allen had heard about D'Onofrio's "fantastic new deal". When Stoller and Allen replied that they had not, Pfingst explained the business of the company. When Allen heard the name of the company, he replied, "Oh my God what a name. You have to change the name. In a name there is 50 points."* Stoller asked how much stock they could get. D'Onofrio said they could get "as much as we want", and that he was going to make it a Regulation A offering of 100,000 shares at $2 or $3 per share. Stoller replied that D'Onofrio didn't know the game; that there had to be a thin float; that the offering had to be over $5 per share; and that

* D'Onofrio explained that a point is $1. Since the public was buying "names," a glamorous name meant a higher priced stock.

the offering should be "50,000 shares at $6 or less shares at $7", and could D'Onofrio arrange it. When D'Onofrio replied that he could do anything Stoller wanted, Stoller asked how much stock they could get. D'Onofrio said they could get 25,000 shares of an offering of 40,000 to 45,000 shares. Pfingst said they would send an "indication letter" from Bank Hofmann, as they had done on a previous deal, indicating for 25,000 shares, pay for it in the United States and then funnel it into their secret accounts. Stoller then said they could "blow-off" * this stock to Bonavia and Weissinger at $50 per share. When D'Onofrio asked how they could rescue ** Bonavia and Weissinger, Stoller replied that "... we can use some Eleanores" ***, although adding that he didn't really care whether they got Bonavia and Weissinger out of the stock. Stoller then stated that the profits would be a "cool million" bucks and for a million bucks he would sell "shit". When D'Onofrio told Stoller that the partners in the deal were Stoller, Allen, D'Onofrio and Pfingst, Stoller, outside of the presence of Pfingst, chastised D'Onofrio for making Pfingst an equal partner. D'Onofrio replied that Pfingst was D'Onofrio's partner and had been in on other deals with D'Onofrio. Allen added that it did not matter whether each had a quarter of a million or a third of a million. It was agreed that they would try to make the offering between 40,000 and 50,000 shares (Tr. 140-7). It also was agreed that Herbert would be a 10% partner in the deal (Tr. 148).

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* D'Onofrio explained the term "blow-off" as being the point when one person decides to give, i.e. sell, the stock to another person or institution at a ridiculously higher price (Tr. 144).

** D'Onofrio defined the term "rescue" as promoting the stock to $60, $70, $80 per share so that Bonavia and Weissinger would get the stock at $50 per share and sell out at a profit (Tr. 145).

*** Eleanore Wien Goldinher, a broker with Hirsch & Co. at the time was called as a government witness. Her testimony is referred to further in this brief.

3. Frank Learns Of The Deal, The Indication Letter Is Sent And Subsequently Frank Becomes A Partner In The Conspiracy By Telling Stoller, Allen And D'Onofrio How To Do The Deal

D'Onofrio first met Frank in 1967 (Tr. 149). In September, 1968, after the Baur Au Lac meeting, Stoller, Allen and D'Onofrio met with Frank at the law offices of Feldshuh and Frank. Stoller told Frank that they, meaning Stoller, Allen and D'Onofrio, were coming out with a new deal. When Frank asked "What kind of a deal?" and "How are you going to handle it?", Allen explained that the company was in the field of vocational education. Stoller explained that they, meaning Stoller, Allen and D'Onofrio, were handling it the "same way we handled the last one, through Bank Hofmann"; that Pfingst was the attorney for the company and that they would take the stock, and "Blow it off to Muir and Joe, the way we handled the last one." Frank replied that, "If it is a good stock and is going to be a hot number, make sure I get stock this time, because the last time I didn't get any stock" (Tr. 151-3).

In August 1968, D'Onofrio and Pfingst drafted the "indication letter" (Tr. 154). In mid-October 1968, D'Onofrio Pfingst and Herbert had the letter typed and sent to TWP, with D'Onofrio retaining a copy (Tr. 155-6, 160-5, 1077; GX 4).

In approximately mid-November, 1968, Stoller, Allen and D'Onofrio met with Frank at which time Stoller showed Frank a copy of the "indication letter." Frank asked who sent the letter. When D'Onofrio replied that he and Pfingst sent the letter, Frank replied that Pfingst was "a country bumpkin lawyer . . . he's a shmuck, he doesn't know anything about the SEC," and that Stoller, Allen and D'Onofrio had "a lot of troubles". Frank explained that Bank Hofmann could not have knowledge of the TWP

offering.* Accordingly, it could not indicate for 30,000 shares of stock, explaining that TWP was different from the previous deal. D'Onofrio said that Pfingst was no longer a partner because he was elected to the New York State Supreme Court. Stoller said that they, meaning D'Onofrio, Allen and himself, were going to take 20,000 to 25,000 shares, take the stock to $50 and blow it off to Weissinger and Bonavia. D'Onofrio added that he thought Weissinger and Bonavia could be used. Frank then said, "Now, look I am going to show you how to do the deal without getting caught. You fellows follow my direction and everything will be fine."**

Frank said that 25,000 shares out of 42,000 was too much and "would raise a flag to the SEC"; that 15,000 shares was the most they could have; and that they get the shares in the form of nominees. Frank said they each should find five people who they could trust, sell 1,000 shares to each nominee for a total of 5,000 shares and buy more, if they went, in the aftermarket. Frank explained that the stock should be issued to the nominees, and then after D'Onofrio opened the market at $9 per share, the stock should be bought back at a point or two higher, although Stoller objected to giving the nominees more than a dollar per share. Frank then said, "All right, now I have shown you the way, now everything is going to be okay. What am I getting for it?" When Stoller asked what Frank wanted, Frank said "I want a thousand shares of stock. I want it in my account over at the bank. I want

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* It should be noted that the indication letter is dated October 17, 1968. The Regulation A notification for TWP was not filed with the SEC until October 25, 1968 (GX 1A). Accordingly, the letter evidences an awareness of TWP going public, prior to the time TWP made any public announcement of its intentions to do so.

** Frank admitted getting $15,000 for telling Stoller, Allen and D'Onofrio how to do the deal. See Point I of this Brief hereinafter at pp. 57-61.

$15,000." D'Onofrio replied that he would pay his part of the $15,000, but "the thousand shares comes from these two guys, Phil and Jerry." When Stoller and Allen said they would take care of the 1,000 shares, Frank said, "I want you fellows, as you go along on this deal, you don't do anything, you don't go to the bathroom unless you talk to me if it concerns this deal" (Tr. 168-77). Frank also advised Stoller, Allen and D'Onofrio that, in order to throw the SEC off base, they should obtain a bill of sale from the bank with their name and address on it verifying a sale to Bank Hofmann. Frank further advised them to have checks drawn on a New York bank showing a profit for internal revenue purposes (Tr. 182).

Around Thanksgiving, 1968, Stoller and D'Onofrio met with Herbert and Ernst Ballmer ("Ballmer"), another official at Bank Hofmann*, and explained to them what Frank had said at the mid-November meeting (Tr. 180-3).

4. The Nominees Are Selected, The Issue Becomes Public and The Stock Is Placed In The Secret Accounts

In mid-December 1968, Stoller, D'Onofrio and Allen met at the Camelot Restaurant in New York. Allen explained that he was having trouble finding nominees. D'Onofrio said he was using nominees but in a fashion different from that told to them by Frank. D'Onofrio said he was going to give his nominees stock and then take back most of the stock, leaving the nominees a small portion to sell for their own profit. At the meeting Stoller agreed to allow Allen to use Joseph Arden as one of Allen's nominees (Tr. 184-5).

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* Ballmer was named as a co-conspirator in this case. On March 20, 1974 Indictment 74 Cr. 371 was filed naming Ballmer and Bank Hofmann as defendants and charging them with the same acts as alleged in the instant case. Ballmer, a Swiss citizen, remains a fugitive.

In January, 1969, Stoller and Allen visited the offices of TWP and gave the names of their nominees to Herzfeld so that Herzfeld could send offering circulars to them. These people were; Herman Talansky for 1,000 shares; Mildred Stoller for 1,000 shares; William Brief for 1,000 shares; Delores Abramson for 1,000 shares; and Ruth Pollin for 1,000 shares (Tr. 1082, 1084).* Allen's nominees were Janice Hickok for 1,000 shares; Sarah Striziver for 1,000 shares; Joseph Arden for 1,000 shares and Willard La Morte for 1,000 shares. Allen took 1,000 shares in his own name (Tr. 2400-3)**. D'Onofrio's nominees were: Ruth Recca for 1,000 shares; Warren Bundy for 1,000 shares; Paul Strauch for 1,000 shares; Katherine T. Osborne for 1,000 shares and Kathleen Howe for 900 shares (Tr. 193). As a result, Stoller had 5,000 shares in nominee names, Allen had 5,000 shares in nominee names, and D'Onofrio had 4,900 shares in nominee names.

In the latter part of 1968 James Feeney ("Feeney") was told by D'Onofrio that he was going to help underwrite TWP. D'Onofrio said that he would solicit people to buy the stock and asked if Feeney would be interested in purchasing some stock. Feeney eventually purchased 1,000 shares (Tr. 1232-3). Feeney's uncle Warren Bundy became a D'Onofrio nominee (Tr. 1235-6, 1240).

Feeney asked D'Onofrio how he was going to run the stock. D'Onofrio replied that Stoller and Allen were strong

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* Abramson, Pollin and Mildred Stoller were identified as Stoller's mother, mother-in-law and wife respectively (Tr. 118, 1521-2; GX 67B). Brief was identified as a friend and neighbor of Stoller (GX 105) and Talansky as an associate of Arden who Stoller claimed was his secretary (GX 105). On the defense case, Arden identified Talansky as his brother-in-law (Tr. 2257-8).

** Hickok is Allen's wife's maiden name (Tr. 1198); Striziver is the maiden name of Arden's wife (Tr. 2280-1); and La Morte is a client of Frank (Tr. 2507).

in "the street," they had plenty of participation and it would be their job to make sure that the stock moved up. D'Onofrio also said that Bank Hofmann would be the ultimate purchaser after the stock reached a certain level (Tr. 1238).

In early 1969, D'Onofrio told Feeney that the shares of stock would be in names of people who did not own the stock and that they would be in nominee names (Tr. 1239-40).

In January, 1969, just prior to the public offering, Feeney, accompanied by D'Onofrio, met Stoller and Allen. When Feeney asked how they were going to move the stock, Stoller and Allen replied that they were going to "box" the stock;* that it was D'Onofrio's job to keep the "box" together; and that one, two or three brokerage houses who were closely connected and friendly would buy and sell the stock back and forth at increasingly higher prices. Stoller further explained that when the stock reached a certain price, Herbert would purchase the shares for Arabs and Jewish people who died during the war.** Stoller also explained that the stock would be "crossed at Bank Hofmann." In other words, the stock would be sold away from the market and sold to the bank (Tr. 1243-7).

On or about February 2, 1969, Stoller, Allen and D'Onofrio met at Frank's office. Frank asked how the offering circular was coming along. D'Onofrio replied that Pat Barton, Pfingst's nephew, was handling it.*** Frank asked how many stockholders they had. When D'Onofrio replied

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* Feeney described a "box" as being a situation where no shares are sold away from the "intergroup," meaning the people who receive shares in the original offering (Tr. 1244).

** As is discussed further, Feeney testified to a later conversation with Stoller where Stoller said that the purchasers were not Arabs and deceased Jewish people, but, in fact, were Bonavia and Weissinger (Tr. 1250-4).

*** Pfingst had withdrawn from the conspiracy in November, 1968, after being elected a Justice of the New York State Supreme Court.

that they had 75 to 85, Frank said that they needed over 100 and that some stock should go to people who Stoller, Allen and D'Onofrio did not know so that "if anything happens with the SEC there will be a lot of people called down who don't know anybody and that got stock and made money" (Tr. 190-2).

On February 7, 1969, TWP became effective with 42,000 shares being offered to the public at $7 per share (GX 1). On February 21, 1969, 14,900 shares (5,000 for Stoller, 5,000 for Allen and 4,900 for D'Onofrio) were issued and registered in the names of the nominees (Tr. 88; GX 2a-2p). During this period of time, Stoller spoke on two occasions with Mel Schneiderman, ("Schneiderman"), a market maker at the brokerage firm of E. F. Henderson & Co., Inc.* On the first occasion, Stoller told Schneiderman that he (Stoller) had a new promotional called TWP; that he was going to run the stock; that he and Allen controlled a large block of the stock; and that Schneiderman should let him know when the stock traded. In the second conversation Stoller told Schneiderman to make a market in the stock, and that if Schneiderman had any problems he should call Stoller (Tr. 1449-52). On cross-examination, Schneiderman also testified that it was unusual for Stoller to ask him to make a market in the stock inasmuch as Stoller controlled most of the stock (Tr. 1454-5).

During February, 1969, Stoller told D'Onofrio that he (Stoller) had gotten Schneiderman to go into the pink

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* A "market maker" or trader as he is also called, acts as principal in purchasing and selling securities for his own account or the account of his firm. His profit is derived from the difference in price between what he "bids" (buys) the securities and "asks" (sells) the securities. By trading the securities he in effect "makes a market" in those securities.

sheets.* Stoller asked D'Onofrio if D'Onofrio had gotten anyone to go into the pink sheets. D'Onofrio said that he had and was working on some others (Tr. 238-9).

After the stock was issued D'Onofrio advised his nominees to sign the certificates and have their signatures guaranteed (Tr. 196-7). D'Onofrio picked up Bundy's certificate and Muriel Barter, D'Onofrio's mistress, picked up the remaining four certificates (Tr. 194). One of D'Onofrio's nominees, Santo Recca, the husband of Ruth Recca, testified that D'Onofrio had told him of TWP around January, 1969, and that D'Onofrio had paid for 900 shares registered in Ruth Recca's name and that he received the certificate, signed it and sent it back to D'Onofrio (Tr. 1839-42; GX 2a). William Brief, Stoller's neighbor and a nominee, testified that Stoller had told him in the latter part of January or early February, 1969, that he (Stoller) would purchase up to 1,000 shares of TWP, if Brief received the shares on the offering. Stoller eventually bought the 1,000 shares from Brief at $8¼ per share (Tr. 1817-8). In fact, Stoller had made the same deal, namely to purchase the 1,000 shares at $8¼ per share, with each of his nominees (GXs 62B and 105).

On or about February 22, 1969, Stoller, Allen and D'Onofrio, each in possession of the certificates they received from their nominees, met in Frank's office (Tr. 187-8). At this meeting D'Onofrio observed the certificates of

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*The pink sheets which are published by the National Quotation Bureau, reflect the "bid and ask" of the brokerage firms marking a market in those securities appearing in the pink sheets. While the bid and ask do not reflect the purchases and sales of the particular securities they do reflect the range of the market. In effect, they are an advertisement by the brokerage firms as to the approximate prices they are buying and selling the securities. The firms are, however, obligated to buy or sell as the case may be 100 shares at the bid and ask price listed.

Stoller and Allen and he identified such names as Pollin, Brief, Abramson, Joe Arden, and Janice Hickok (Tr. 190).

On or about March 11, 12 or 13, 1969, D'Onofrio went to Switzerland with Stoller (Tr. 192). D'Onofrio carried his 4,900 shares and Stoller had his certificates (5,000 shares) and Allen's certificates (5,000 shares) (Tr. 197). When they arrived in Switzerland, he, Stoller, and Herbert had a conversation at Bank Hofmann. D'Onofrio told Herbert to make up a receipt for $49,000* less costs and a receipt for the certificates. Stoller instructed Herbert to make up a check for $50,000 less costs for him and a check for Allen and receipt for certificates (Tr. 198). D'Onofrio then instructed Herbert to put his 4,900 shares into coded account "Gypsy". Stoller instructed Herbert to put his 5,000 shares in coded account "Shirley". Stoller also instructed Herbert to put Allen's 5,000 shares into Allen's coded account, "Erika" (Tr. 200). Herbert then gave D'Onofrio a check for $48,583.50 and receipts showing the receipt of the 4,900 shares; a confirmation and a duplicate confirmation (Tr. 200-1, 216; GX 11-13). The $48,583.50 check was drawn against D'Onofrio's account "Gypsy" (Tr. 217). Herbert gave to Stoller a confirmation receipt, a check and Allen's certificates which were not properly guaranteed. Herbert also gave Stoller a receipt and check for Allen (Tr. 218-9).

5. Bonavia Is Told About The Deal, But Refuses To Buy Any Stock In TWP

Bonavia knew Allen and Stoller since 1959 and 1960 respectively (Tr. 1467-8). Between 1959-1965 Stoller and Allen recommended securities to Bonavia (Tr. 1470).

In 1965, Bonavia opened a full disclosure account at Bank Hofmann by signing a document given to him by Stoller (Tr. 1475, 1481; GX 52). Prior to opening the

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* $10 per share for 4,900 shares.

account Stoller told Bonavia that such an account would be advantageous because Bonavia would not have to pay income taxes on income derived through transactions conducted through the account. Stoller also said that Bonavia could take advantage of lower margin. Bonavia received the necessary documents from Stoller and told Stoller that the account was to be a full disclosure account subject to IRS inquiry (Tr. 1475-7).

In the spring of 1968 Bonavia opened his secret account, code name "Barbin", by signing two documents given to him by Stoller (Tr. 1482, 1488, 1490, 1493; GXs 53A and 53B). The documents were returned to Stoller and Bonavia saw them next on April 30, 1968 while visiting Bank Hofmann (Tr. 1489, 1494), where he signed another document (Tr. 1494; GX 53C). Allen suggested the name "Barbin" to Bonavia, and the account was given the code number "4318" (Tr. 1489).

Prior to opening the account, Stoller, in the latter part of 1967 or early 1968, told Bonavia that Bonavia's full disclosure account was opening the window to their transactions and would allow the government to see which stocks they were trading for their fifty to sixty clients. Stoller said he wanted Bonavia to have a secret account and that he (Stoller) and Herbert had worked out a way to keep the account secret. When Bonavia met Stoller and Herbert, Stoller said that Herbert was an unscrupulous banker; that Bank Hofmann was the crookedest bank in Switzerland; and that Stoller's so-called consulting fees were really funds from Stoller's own account. Herbert said that if Bonavia opened up a secret account, Bank Hofmann would send him confirmations of purchase and sale on European stocks other than those purchased in the account. In this way, Herbert explained, American authorities could not trace the stock (Tr. 1482-7).

In July, 1968, Stoller and Allen asked Bonavia for $65,000 because, as Stoller explained, they needed some money. Stoller also said that they had a good stock coming up that is "going to make a lot of money" and if Bonavia paid them the $65,000 they would not charge Bonavia anything on the first $300,000 of profit. Bonavia agreed and signed an authorization to pay $32,500 each to Stoller and Allen (Tr. 1495-8, 1500-1; GXs 53A, 53B, and 53C).

From 1967 through 1970 Stoller and Allen openly discussed their respective accounts "Shirley" and "Erika", with Bonavia. Stoller often showed Bonavia a statement of the account "Shirley" (Tr. 1501-4).

In the fall of 1968, Stoller, in the presence of Allen, told Bonavia that he (Stoller) had a stock promotion coming up and that he had met a stock promotor Ramon N. D'Onofrio who was nearly as good as he (Stoller) was in running a stock. Stoller said that the stock was TWP and "the SEC and the United States Government could never attack it because to attack it would be like speaking ill of country and motherhood." Stoller also said that he was going to do a real job on the stock and that it would be a promotion of his life. He said he could run the stock to 100, split it several times and run it back to 100 again.

In January 1969, Stoller, in Allen's presence, told Bonavia that TWP had a $25 million contract with McGraw-Hill. He then asked Bonavia to buy stock since the company was going to go public. After this conversation Stoller, Allen and Bonavia went to D'Onofrio's office where Stoller repeated that TWP had a $25 million contract with McGraw-Hill. After this meeting, they went to the office of TWP where they met Moss. Stoller again said that TWP had a $25 million contract with McGraw-Hill. After returning to the E. 60th Street office of Stoller and Allen, where Stoller claimed that all of the automobile manu-

facturers were interested in TWP, Bonavia returned alone to see Moss. Moss denied there was a $25 million contract with McGraw-Hill, whereupon Bonavia said he was not going to buy TWP stock. Bonavia then returned to see Stoller and told Stoller that because Stoller referred to promotions, Bonavia wanted to stay out of the deal (Tr. 1507-14).

In February, 1969, Bonavia went to Switzerland. Prior to going, Allen told him that he did not want to see him "jerked" around; that Stoller planned to put TWP stock into Bonavia's account and that Bonavia should go to Switzerland and tell Herbert that no TWP stock should be put in Bonavia's account. When Bonavia saw Herbert, Herbert said he never heard of the company. Bonavia said that under no circumstances should the stock be put into his account. Herbert agreed not to put it in Bonavia's account. Bonavia then returned from Switzerland and spoke to Stoller and Allen. Stoller said there was a binding contract with McGraw-Hill for $25 million. Bonavia then saw Moss alone who said there was no contract with McGraw-Hill. Bonavia next saw Stoller and Allen and told Stoller that Moss denied the existence of the $25 million contract and that Stoller had lied to him. Stoller said he was going to get D'Onofrio to remove Moss as president; that as the promotor of the stock, he did not want the president of the company talking to a prospective investor that way; that he was glad Bonavia did not buy any because Stoller had stock hidden in foreign corporations, his mother-in-law's name, mother's name, wife's name and friend's names and that he has "taken care of that, so that no $200 a week United States attorney or $200 a week SEC man will ever catch me". Stoller said further that the stock would make a million dollars and if Bonavia bought he would run the stock to $100. Stoller said he could make Bonavia a million dollars. Bonavia replied that he did not want the stock (Tr. 1516-21).

6. The "Cross" Is Made To "Barbin" and "Pompeii" And Frank Helps Resolve The Emanuel Deetjen Problem

Toward the end of March, 1969, D'Onofrio and Stoller returned from Switzerland after receiving their checks and receipts.* Upon their return, Stoller, Allen and D'Onofrio met at the E. 60th Street office. Allen said that since the stock was now between $45 and $50 per share, after they had opened it a few weeks earlier, it would be in their interest to get out and "cross" it to Bonavia and Weissinger.** D'Onofrio and Stoller agreed, with Stoller saying that it would be better to make a quick buck than wait. Stoller then called Herbert and with D'Onofrio on another extension told Herbert that they had decided to make the "cross". Herbert replied that the "pink sheets" had to indicate on the day of the "cross", the price of the "cross"; otherwise the bank would not make the transfer. Approximately three to five days later, Stoller and D'Onofrio went to Switzerland and spoke to Herbert at Bank Hofmann. Stoller and D'Onofrio said they wanted to make the "cross", at which point Herbert checked the current price and then prepared the necessary papers to make the "cross" from "Shirley", "Erika" and "Gypsy" to "Barbin" and "Pompeii". The amount "crossed" was 18,200 shares, 9100 shares for Bonavia and 9100 shares for Weissinger.*** The additional 3300

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* According to brokerage records of Bonavia obtained from Bank Hofmann, their return would have had to have been in early to mid-March, 1969, prior to March 11, 1969. This is so because the "cross" commenced on March 11, after their return.

** According to the "pink sheets" (GXs 106, 106A-106Q) the bid and ask price of TWP was within the $45-50 range during the first two weeks of March, 1969.

*** D'Onofrio was not sure whether the "cross" was 18,200 or 18,400 shares. However, he did testify that the shares were evenly divided between Bonavia and Weissinger (Tr. 228). Since Bonavia's confirmations (GXs 65a-65h) reflect 9100 shares purchased, the total amount would therefore have to have been 18,200 shares.

shares (14,900 + 3300 = 18,200) had been purchased in the after market by Stoller for himself, Allen and D'Onofrio. In fact, Bank Hofmann began to buy TWP on February 25, 1969 (GX 107). The total cost to Bonavia and Weissinger was approximately $450,000 each (Tr. 223-8). Bonavia's confirmations of purchase of reflect a total purchase price of over $449,000. (Tr. 1531; GX 65a-65h).

In early April, 1969, D'Onofrio received a telephone call from Stoller.* Stoller told D'Onofrio that Herbert called him and said that Deetjen would not transfer the stock and therefore the "cross" would revert back. Stoller explained that Herbert had said that Deetjen claimed that Stoller, Allen and D'Onofrio were not the bona fide owners and unless they sent bills of sale immediately to Bank Hofmann, they would lose the million dollars they had made (Tr. 239-40).

After speaking to Stoller, D'Onofrio called Herbert. D'Onofrio told Herbert that he had spoken to Stoller. Herbert replied that the problem was not that serious; that when Frank instructed them on the paper work, they neglected to get bills of sale from the nominees to Stoller, Allen and D'Onofrio and from Bank Hofmann to Stoller, Allen and D'Onofrio. Herbert said if he had these bills of sale he could get the stock transferred through Deetjen. Herbert also said that if they come over to Switzerland without Allen, Allen's bills of sale would have to be notorized. Herbert suggested that Frank notorize Allen's bills of sale (Tr. 250-2).

What precipitated Herbert's call to Stoller was the fact that Herbert, on March 13, 1969, sent the 14,900 shares to the New York office of Deetjen for transfer into "street

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* Again, based upon certain documents in evidence, namely, correspondence to and from the brokerage firm of Emanuel Deetjen & Co., this telephone call had to have occurred in mid-March rather than in early April.

name." Accompanying these shares was a letter requesting such a transfer. The shares were received by Sheldon Levine ("Levine"), assistant manager of the margin department at Deetjen (Tr. 670-4; GX 16). Deetjen was concerned about the transfer because Deetjen had never received shares from Switzerland in the manner in which they received these shares. They had always bought in street name. Deetjen also was concerned that the stock had gone from $26 to $66 per share in a couple of weeks (Tr. 679-80). A copy of the letter sent to Levine was sent to Pierre Henchoz ("Henchoz") a registered representative at Deetjen who serviced Bank Hofmann's account at the Laussane, Switzerland office (Tr. 655-8; GX 18).

Several days after receiving the letter (GX 18) Henchoz spoke to Herbert advising him that the stocks had been received in New York. Herbert asked that Henchoz confirm that the stock would be transferred into "street name." Henchoz, after receiving a telex from the New York office, spoke to Herbert and advised him that Deetjen needed a proof of ownership before the shares would be transferred into "street name." Herbert asked what proof of ownership meant. Henchoz responded by sending a telex to him (GX 19) (Tr. 660a-3).* After receiving the telex, Herbert called Henchoz and told Henchoz that he (Herbert) wanted to speak to the senior partner of Deetjen, Jean Francois DeCharriere ("Decharriere") (Tr. 666-7). Herbert Von Bredow ("Von Bredow"), the manager of the Lausanne office, also spoke to Herbert during March, 1969. After receipt of the March 13, 1969 letter (GX 18), when Von Bredow said Deetjen needed proof of ownership, Herbert replied that the shares, having been signed by the owners, showed sufficient proof of ownership, and that it would be difficult to furnish immediately proof of ownership (Tr. 687-90).

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* The telex is in French. The translation appears at Tr. 665.

On March 28, 1969, DeCharriere, while in Paris with Von Bredow, received a call from Henchoz requesting that Decharriere call Herbert at Bank Hofmann. Decharriere did call Herbert and told Herbert that Deetjen would not transfer the stock unless they received proof of ownership. Herbert said that if he did so, he would be breaking bank secrecy laws. Decharriere replied that that was Herbert's problem, notwithstanding Herbert's threat that Bank Hofmann might become a less active customer of Deetjen. Herbert replied that he would send a letter (Tr. 675-8).

After speaking to Herbert,* Stoller called D'Onofrio and said a meeting had been arranged to see Frank about the problem with Deetjen. The next day Stoller, Allen and D'Onofrio met Frank at Frank's office. Stoller addressed Frank and said, "We are about to lose a million dollars. We have a big problem." D'Onofrio explained that they neglected to have bills of sale from their nominees to themselves and from Bank Hofmann to themselves; and that Deetjen would not transfer the securities into "street name." When Frank said they should go to another broker, D'Onofrio said that Herbert did not "want to raise a red flag" by going to another broker. Allen then asked Frank to prepare his bills of sale. Frank instructed his secretary to prepare the bills. D'Onofrio then said that because Allen could not go over to Switzerland, Herbert wanted Allen's receipts notarized. Frank then took out his notary stamp and stamped Allen's bills of sale (GX 21-25). D'Onofrio and Stoller each said they would get their own bills of sale (Tr. 252-5). One of D'Onofrio's nominees, Santo Recca, had his wife sign the bill of sale in mid-March after D'Onofrio had said that he needed the receipt for the stock Recca had given him (Tr. 1843-5; GX 8). William Brief, one of Stoller's nominees, signed his bill of sale for Stoller

* This refers to the conversation in mid-March, 1969 previously mentioned where Stoller first called D'Onofrio and said Deetjen would not transfer the stock (Tr. 239-40).

on February 27, 1969, or shortly thereafter, after Stoller had said that the bill of sale was just a matter of showing the sale of shares (Tr. 1821-2; GX 30).

After the bills of sale were prepared, Stoller and D'Onofrio collated them, as well as Allen's, in the Swissair lounge at Kennedy Airport. When they arrived in Switzerland, they met Herbert. D'Onofrio stacked his five receipts for "Gypsy," Allen's receipts for "Erika" and Stoller's receipts for "Shirley." Stoller, however, was missing his bill of sale from Bank Hofmann. Herbert then had the bill of sale prepared (GX 31). Herbert took the receipts, made photostatic copies and returned the copies to Stoller and D'Onofrio. Before making copies, Herbert said that he might have to delete the price of the stock and total consideration because the price of $55 to $60 a share would look "very bad to Deetjen to see you bought the stock for $7 a short time ago and that we are now transferring it while it is $60 a share. . . ." When he returned the receipts, the price and total consideration were blocked out (Tr. 256-8). D'Onofrio's receipts are copies of those turned over to Herbert and returned to him after photostats were made (Tr. 258-9; GXs 5-9, 14). D'Onofrio also identified Allen's receipts, having seen them in Frank's office, at the Swissair lounge, and at Bank Hofmann. D'Onofrio also identified Frank's signature on the receipts (Tr. 268-70; GXs 21-25) and Allen's signature on each of the receipts (Tr. 283). D'Onofrio also identified Stoller's receipts, having seen them at the Swissair Lounge and at Bank Hofmann. Stoller's receipt from Bank Hofmann was signed by Stoller in D'Onofrio's presence (Tr. 273-6; GXs 26-31).

On or about March 30, 1969, Edmund Purvis, general counsel to Deetjen, received from Bank Hofmann, Stoller's, Allen's and D'Onofrio's receipts along with a cover letter dated March 28, 1969, addressed to DeCharriere and signed

by Herbert (Tr. 1071; GX 20). On April 25, 1969, the 14,900 shares were transferred from the fifteen nominee names into the "street name" of Emanuel Deetjen & Co. (GX 109).

7. The Brokers Are Touted, Bonavia Learns That the Stock Has Been Put In His Account, And The SEC Begins An Investigation

When Stoller and D'Onofrio returned from Europe after delivering their receipts and Allen's receipts to Bank Hofmann, they met with Allen and Joseph Arden. D'Onofrio asked Stoller and Allen what they were doing to tout the stock and to get it out of Bonavia's and Weissinger's hands so they could start making money. D'Onofrio said he had touted the stock to two member firms. Allen said he was meeting with Brad Thurlow who would write a letter * on the stock.** Stoller said he was "going to get to work on it right now." Stoller then called Eleanore Wien Goldinher ("Goldinher"). With D'Onofrio on the extension, Stoller told Wien that she had better get in on the TWP deal, start buying the stock for her customers and guaranteeing that the stock would go to $70 or $80 per share. When he got off the phone, he told D'Onofrio that the call was good for two or three thousand shares (Tr. 284-6).

Goldinher, a broker at Hirsch and Co., received a call from Allen on April 15, 1969.*** She had known Allen and Stoller since 1964. Allen told Goldinher that TWP would

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* D'Onofrio was obviously referring to a stock market newsletter.

** As is discussed below, Brad Thurlow's name was mentioned by Stoller to Bonavia (Tr. 1533).

*** On April 15, 1969, Bank Hofmann began to sell TWP, after starting to purchase the stock on February 25, 1969 (Tr. 107). As is discussed below Bank Hofmann sold 500 shares of the 9100 shares for Bonavia on April 15, 1969 (GXs 66(a)-66(c)).

be another IBM and that she should be sure to get some. Goldinher then told Walter Paruch ("Paruch"), her partner, what Allen had said. After speaking to Allen, Goldinher purchased 100 shares for herself at $64½ per share (GX 68) and 200 shares for husband Milton Goldinher at $62 per share (GX 69). Later that day, Goldinher told Allen that she had purchased the stock. Allen replied that she was going to make a lot of money (Tr. 1927-33). Paruch also purchased TWP on April 15, 1969; 100 shares at $62 per share for his aunt, Rose Hludzenske (Tr. 1849; GX 73).

Also on April 15, 1969, Stoller had a telephone conversation with Nathan Hyman ("Hyman"), a registered representative at F. I. Dupont & Co. Inc. Stoller told Hyman that McGraw-Hill was behind TWP financially and that Stoller thought Hyman could make a lot of money in the stock. After the conversation, Hyman contacted some of his customers, Michael Howard and Martin Frank,* and purchased 100 shares for each customer at $70 per share (Tr. 1908, 1910-1).

On April 25, 1969, Stoller telephoned Paruch. Stoller said TWP was not a "deficit" company and that the company would earn $60 per share in 1969 and $1 to $1.50 per share in 1970 (Tr. 1854-5). During the conversation with Stoller, Goldinher asked Paruch to ask Stoller if Stoller would buy TWP for a child. Stoller told Paruch that he would (Tr. 1855, 1934). After this conversation, Paruch bought 50 shares for his wife's aunt, Sally Turner, and 50 shares for his aunt, Rose Hludzenske (Tr. 1856-7; GX 73A). Goldinher also bought 70 shares at $50 for her daughter Frances, and 30 shares at $50 for herself (Tr. 1934-5; GXs 70 and 71).

On or about May 20, 1969, Hyman called Stoller and asked him what had happened to the stock. Stoller replied

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* No relation to appellant Martin Frank.

that "there's no reason why the stock should be down, the stock is still good." * After the conversation, Hyman purchased 100 shares each for two of his customers (Tr. 1912-3).

During this period of time, Bonavia went to Switzerland on or about May 1, 1969 where he met with Herbert. Before going, Allen told Bonavia that TWP had been placed in his account. Bonavia told Herbert that he (Bonavia) had heard that TWP was in Bonavia's account. Herbert denied this. Toward the end of May, 1969, Bonavia returned to Switzerland where he met Herbert. Herbert told him that Stoller was a crook; that Stoller would cost him the presidency of Bank Hofmann; and that 9100 shares of TWP had been placed in his account. Bonavia asked for a copy of his account which he had never received. Herbert said he would mail the account to Bonavia. Bonavia, however, never received the account (Tr. 1523-6).

When Bonavia returned from Switzerland, he met Stoller. He told Stoller that he knew that 9100 shares were in his account and that he believed the stock came from Stoller. Stoller then admitted that the stock had been placed in Bonavia's account. He further stated that he could make Bonavia $1 million in TWP and for $40,000 he could buy market letters such as Value Line. Stoller also said he could get Brad Thurlow to do a writeup on the stock, and that Allen should use his influence with the Wall Street Journal and Baron's Magazine. Bonavia told Stoller to pay the $40,000, make the million dollars for himself and get the stock out of his account (Tr. 1531-1534).

In late April, 1969, Moss called D'Onofrio and told D'Onofrio that the SEC had commenced an investigation

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* Stoller knew to the contrary. One of the reasons was perhaps the SEC investigation which D'Onofrio told Stoller about in April, 1969 (Tr. 292).

after receiving an anonymous letter (Tr. 291-2). Moss and Herzfeld had learned of the letter from Bruce Rich, an attorney with the SEC (Tr. 1085). D'Onofrio then told Stoller and Allen. Approximately the next day, Stoller, Allen and D'Onofrio met with Frank at Frank's office. When D'Onofrio showed Frank the letter, Frank said he would check to see if there was an SEC investigation; and if there was, D'Onofrio should talk to Moss to "make sure that this firm or that I represent Training With the Pros so I can protect us" (Tr. 292-4). On May 27, 1969, Moss testified at the SEC (Frank XX). After this meeting, D'Onofrio met Moss and Herzfeld and told them to talk to Frank. D'Onofrio had previously told them that he was going to get a good SEC lawyer to represent them (Tr. 1085-7).

On June 20, 1969, Stoller testified under oath at the SEC (GX 105). After testifying Stoller met D'Onofrio at D'Onofrio's office and told him that he (Stoller) had testified at the SEC without a lawyer and had shown the SEC "all my papers, Marty [Frank] said in the event we got caught we could show them." Stoller said he also told the SEC that he was a consultant to Bank Hofmann. When D'Onofrio said Stoller was crazy, Stoller replied, "Don't even be worried, those dumb bastards at the SEC don't know what they are doing anyway." D'Onofrio then called Allen and told him to set up an appointment with Frank.

In late June or early July, Stoller, Allen and D'Onofrio met with Frank. D'Onofrio told Frank that Stoller had gone to the SEC. Stoller said he showed them all papers from Bank Hofmann and that they had sold the stock to Bank Hofmann for a $20,000 profit.* Frank asked Stoller if Stoller had told the SEC that the stock they bought at

* It will be recalled that the so-called "sale" was in fact a sale by Stoller, Allen and D'Onofrio to their own accounts. In other words, they bought the stock from themselves (Tr. 217-8).

Bank Hofmann went into private accounts. When Stoller said he had not, Frank told Stoller that Stoller had perjured himself and that Stoller should have pleaded the Fifth Amendment. D'Onofrio said he would plead the Fifth Amendment if subpoenaed. Frank said to D'Onofrio that it was imperative that his office represent TWP in the SEC investigation "in order to protect ourselves." After the meeting D'Onofrio told Moss to use Frank's law firm or else they were splitting (Tr. 296-301).

8. Bonavia Is Repeatedly Threatened Not To Talk and Stoller Tells Feeney How the Deal Was Done

In the fall of 1969, Bonavia received a subpoena from the grand jury. Prior to receiving the subpoena Stoller called Bonavia, told him that he would be getting a subpoena and that when Bonavia did receive it, he should meet Stoller in New York (Tr. 1534-5). At about this time, D'Onofrio met with Stoller and Allen at D'Onofrio's office. Allen said Bonavia had been called by the United States Attorney and they were worried about Bonavia talking about TWP and other stocks. Stoller said that if Bonavia talks he'll "bury him" and if he has to, Stoller "will hire somebody for $15,000 and have him run over by a truck." D'Onofrio asked Stoller if he should give Bonavia lettered stock. Stoller said Bonavia wanted his whole half million dollars back but Stoller was not going to give him a penny. D'Onofrio said they could give Bonavia lettered stock to keep him patient in the meantime (Tr. 301-3).*

* The term "lettered stock" refers to securities purchased under an investment letter. The investment letter which is given to the seller by the buyer states, in substance, that the purchaser will not sell the securities into the market but rather hold the securities for investment. This is so because "lettered stock" cannot be sold into the market because of some restriction on the stock.

When Bonavia received the subpoena he came to New York and met Stoller. Stoller told him that he (Bonavia) had seen account "Shirley" and that since Stoller's life was at stake, Stoller would place Bonavia's life at stake. Stoller told Bonavia not to go into the grand jury and name stocks that Stoller recommended or mention any of Stoller's clients at Bank Hofmann. Stoller also told Bonavia that he (Bonavia) would tell nothing about TWP or Bank Hofmann. Stoller further told Bonavia that if Bonavia did not testify the way Stoller instructed him, Bonavia would not leave New York alive. Stoller further told Bonavia that D'Onofrio was a killer and with one phone call could have Bonavia "taken care of" before Bonavia ever got to the courthouse.

The day before or the morning before his grand jury appearance, Bonavia met Stoller again. Stoller had called Bonavia and asked him to stop in, saying that he had been a little rough with Bonavia the first time. At the meeting however, Stoller once again threatened Bonavia by saying that D'Onofrio would take care of him if Bonavia mentioned TWP, their Swiss bank accounts or any of their business. Stoller told Bonavia that if he is asked, "take the Fifth Amendment and play dumb on everything. If they ask you, you don't remember."

At either the first or second meeting with Stoller, Stoller called Frank. Stoller told Frank that Bonavia was there, and "He won't take the Fifth." Stoller then put Bonavia on the phone. Frank asked Bonavia why Bonavia didn't want to take the Fifth. Bonavia replied that he didn't want to. Frank then told Bonavia that Bonavia was "not to involve us in any Swiss bank accounts, anything to do with Bank Hofmann and keep Phil and Jerry out of this." Frank also told Bonavia not to mention TWP. During the conversation with Stoller, Stoller pulled out a copy of Bonavia's "Barbin" account and threatened to send it to the SEC and IRS and put Bonavia in jail for five years.

When Bonavia said Stoller had a numbered account, Stoller challenged Bonavia to prove it. Bonavia said he could not.

After speaking to Stoller, Bonavia went to the grand jury and lied. He then met Stoller who asked him what the testimony was. Bonavia told him, after which they went to Frank, at Stoller's suggestion. Frank asked what questions Bonavia was asked and what he answered. Frank asked if Bonavia "got us involved in any Swiss banking." Bonavia said he did not and Frank replied "That's good," adding, however, that Bonavia still should have taken the Fifth Amendment. Bonavia then asked what was to be done with the TWP that he never wanted. Frank said that if Bonavia did what Stoller told him to do, he would get his money back and make a profit on it. Frank added that Stoller was the best stock promoter in the city. Frank also said that Herbert would soon be president of Bank Hofmann and that they all would make a lot of money.

After meeting with Frank, Stoller and Bonavia took a cab to D'Onofrio's office. On the way over Bonavia told Stoller he did not like the threats or the testimony he gave. He said he felt he should see an attorney. Stoller told Bonavia to "Let Marty Frank handle this and represent you. He has good connections at the United States Courthouse."

When they arrived, they saw D'Onofrio and Allen. Allen said that since Bonavia is one of his oldest clients and "got a terrible hosing on TWP" they should get his money to him. D'Onofrio said they would make it up to him by giving him 100,000 shares of unregistered TWP. D'Onofrio also mentioned that TWP was sold to Fuqua Industries.* (Tr. 1534-47). Stoller once again threatened Bonavia by telling Bonavia that if he opened his mouth

* Stoller told Hyman about the same time that Fuqua was interested in TWP (Tr. 1914).

to the grand jury he would bury Bonavia (Tr. 307). Stoller and Allen left the room. Bonavia then told D'Onofrio that Stoller was going to kill him and that Stoller and Allen wanted him to use Marty Frank, adding that he did not wish to use Marty Frank. D'Onofrio then arranged for Bonavia to retain another lawyer (Tr. 304-7, 1547-58).

In the late fall of 1970, Bonavia met Stoller and Herbert at the Waldorf-Astoria. Stoller told Bonavia that Bonavia was causing trouble on TWP, and he was not going to cause any more trouble. Stoller then produced a copy of the account "Barbin." Stoller asked how Bonavia could prove he (Bonavia) had TWP stock or even a secret account. Bonavia said he could not, adding however, that he could prove the stock went into his account at a higher price than the market value. Herbert said that he had Bonavia "by the ass" because he (Herbert) sold 500 shares of TWP for Bonavia at prices higher than those which Bonavia paid (GXs 65a-65h, purchase confirmations; 66a-66c, sale confirmations). Herbert said that if Bonavia calmed down, when Herbert became president of Bank Hofmann he would cross Bonavia's stock into other accounts. When Bonavia said that he had bought the stock from Stoller, Stoller replied, "Yes, what the hell can you do about it?" (Tr. 1549-52). At this meeting Bonavia also met Weissinger who said he had been taken care of and had gotten his money back (Tr. 1554).

In February or March, 1971, Stoller threatened D'Onofrio,* if D'Onofrio testified about TWP before the grand jury. Stoller received a punch in the mouth for his efforts (Tr. 308-10).

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* D'Onofrio was then providing information to the United States Attorney's Office for the Eastern District of New York on the *Pfingst* cases.

On March 19, 1971, Bonavia wrote a letter to Herbert instructing Herbert to sell 10,000 shares of TWP in Bonavia's account (GX 67). The letter was prepared after Stoller and Allen said they did not want any trouble and would sell 10,000 shares at a time if they had to buy it themselves (Tr. 1555-8).

In December, 1971, during a flight to Switzerland, Feeney asked Stoller what really had occurred with TWP stock. Stoller said that he and Allen had made arrangements for the TWP stock to be kicked back and forth between brokerage houses until the price was in excess of $40 per share. Stoller said further that when the stock reached around $38 or $40 per share, the stock was sold through Bank Hofmann, not to Shieks and Arabs, but to Bonavia and Weissinger. Stoller also said that the stock was gathered at the bank; that it was not really a sale. Then, the stock was taken to a second level, after it was gathered, for his benefit, Allen's benefit and D'Onofrio's benefit; that they owned as many of the shares of the original block as they possibly could get hold of. Stoller said further that the shares for the benefit of D'Onofrio, Allen and himself would be held in an omnibus account until ultimately sold (Tr. 1250-4).

In approximately March, 1972, Bonavia and Feeney met at Allen's apartment with Stoller (Tr. 1259). Bonavia said he was going to sue Bank Hofmann because he never purchased or wanted to purchase TWP stock. Stoller said that he would give whatever help he could to see that Bonavia recovered his losses in TWP (Tr. 1259-61.) Stoller also said that D'Onofrio had talked to the United States Attorney about TWP and was causing problems (Tr. 1560).*

* During this period of time D'Onofrio was cooperating with the United States Attorney's Office for the Eastern District of New York on the *Pfingst* cases.

In September, 1972 Stoller met Bonavia at the Biltmore Hotel. Stoller said that Bonavia had gotten his records from Bank Hofmann.* Stoller told Bonavia that there was enough trouble on TWP without Bonavia causing any problems, adding that Bonavia would not leave New York if he did not do what he was told to do. Stoller also said that if he did not get Bonavia he would get Bonavia's son (Tr. 1560-62).

9. Frank Demands His 1000 Shares of TWP and Stoller Refers To The "Swimming Pool"

In December, 1972, or January, 1973, when D'Onofrio was a fugitive living in Switzerland, D'Onofrio overheard a conversation between Frank, Stoller and Herbert (Tr. 310-1). Frank accused Herbert and D'Onofrio of stealing $40,000 from him.** Frank said the 1000 shares were to be sold at $50 per share and that Herbert was present when this promise was made to Frank. Herbert said he was not, but admitted knowing about the promise.*** Frank then said that if the money were not put into his account, the bank would have "a hell of lot of problems from me" (Tr. 313-315).

That evening D'Onofrio called Frank and told Frank that he (D'Onofrio) had heard that Frank had accused him of being a thief. D'Onofrio said that he had nothing to do with the commitment for the 1000 shares. D'Onofrio then said that he thought this was Frank's first visit to Switzerland and that he better get out of Switzerland and leave Bank Hofmann alone. (Tr. 316-9). Frank's passport

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* Bonavia received his Bank Hofmann records in March, 1972 (Tr. 1528).

** It will be recalled that Frank was promised 1000 shares of TWP as well as $15,000. The 1000 shares were to be sold and the profits deposited in his account (Tr. 177; Stoller XH).

*** Stoller and Allen promised Frank the 1000 shares at a meeting in Frank's office (Tr. 177).

reflected that Frank was at the Zurich, Switzerland airport on December 13, 1972 (GX 108).

In October or November, 1973, Feeney met Stoller at the Hotel Nova Park in Zurich, Switzerland. With Stoller and Feeney were Herbert and Allen. Allen stated that he was going to stay in Switzerland, and not answer any subpoenas. Allen said Stoller had agreed to help him financially and that Herbert was helping him start a periodical or financial paper in Switzerland. Stoller said he did not like Switzerland and that a friend of his would get him temporary residence in the Bahamas. He asked Feeney if he would be interested, since Feeney was then under indictment. Allen said the Bahamas was a good idea and that they give it a code name. They called the Bahamas "Sunshine" or the "Swimming Pool."* Stoller then said that Allen, Herbert and himself were not going to talk to the Government. Stoller said that left only Feeney. Feeney said he would not say anything. On the way to the airport, Stoller, Allen and Feeney discussed the Bahamas as a refuge if indictments were filed and of everybody keeping quiet (Tr. 1262-70).

When Stoller was arrested at Kennedy Airport on November 23, 1973, he had, in his possession, in addition to the Nova Park Hotel key (GX 80B) certain business cards (GX 80A) which evidenced a relationship to Ballmer, Herbert, and Bank Hofmann.**

C. The Defense Case

Frank did not testify in his own behalf. Stoller called Deputy Marshal Michael Adams, Joseph Arden, Melvyn Hiller, Jerome Allen, Joseph Pfingst and John Grimes; and

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* The code name "swimming pool" is discussed in the taped conversation between Stoller and Allen (GX 102A).

** Stoller was arrested on a warrant issued under indictment 73 Cr. 1050 which was filed on November 21, 1973. Indictment 73 Cr. 1050 was then superseded by indictment 74 Cr. 159.

Frank Called Bruce Rich and Alan Rashes and Willard Lamorte.

Deputy Marshal Michael Adams introduced into evidence witness attendance records (Stoller X AA) which showed that from May, 1973, to September, 1974, D'Onofrio received $31,588.10 from the government.* He further testified there was no back up material for the vouchers (Tr. 2243-5). On cross-examination he testified that D'Onofrio received the same "set fee" for travel as every other witness (Tr. 2247).

Joseph Arden testified that he was employed by Stoller-Allen Survey in 1968 and 1969 and that he had known Stoller for close to 20 years.**

Arden testified that he heard about TWP from Stoller and Allen (Tr. 2255-6) and that either Stoller or Allen told him to put in an indication for 1000 shares. Arden also indicated for 1000 shares for his wife. Stoller or Allen also said that if he and his wife purchased the 1000 shares each, Allen said he would purchase the shares from Arden and his wife for $8.25 per share. Arden's brother-in-law, Herman Talansky, also received 1000 shares, which were purchased by Stoller (Tr. 2257-2258).

Arden testified he has known Bonavia since 1968 or 1969 and that Bonavia was a client of Stoller and Allen and that Stoller and Allen were financial consultants (Tr. 2260-1). In February or March, 1969, Stoller and Bonavia during a conversation in Arden's presence, Bonavia asked Stoller what looked good. Stoller replied that TWP was

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* On summation Milton G. Gould, counsel for Stoller, argued in disregard of the evidence and any permissible inference to be drawn therefrom, that these vouchers disguised under the table payments to D'Onofrio by the government particularly, Assistant United States Attorney Ira Lee Sorkin.

** Although Arden was called by Stoller, Frank questioned him [Arden] to rebut the Government's evidence pertaining to the use of Frank's notary stamp on Arden's receipts (Tr. 2265).

speculative but potentially very good. When Bonavia asked Stoller to call Switzerland and get 1,000 shares for Bonavia, Stoller said he would not do so and that Bonavia should get them through his own broker (Tr. 2262-64).

On cross-examination by Sidney Feldshuh, counsel for Frank, Arden said he knew Frank and that in the latter part of February 1969, he went to Frank's office and Frank notarized his signature on GX 21 and his wife's signature on GX 22 (Tr. 2265-6).

On cross-examination by the Government, Arden said that he liked Stoller and would classify him as a son. Arden said that Allen had told him to go to Frank's office to have the signature notarized but that Frank did not tell him why the signature had to be notarized (Tr. 2267-9).

When he was read his SEC testimony, where he said the receipts or bills of sale were signed at home and not in Frank's office, Arden said he signed a second bill of sale at home and that his SEC testimony was correct (Tr. 2275-8).

Arden further testified that his wife's maiden name was Sarah Striziver and that he used his wife's maiden name because he wanted 2,000 shares and if he had indicated for 2,000 shares he might have been cut down (Tr. 2280-1).

Arden also testified that he met D'Onofrio at 118 E. 60th Street a couple of times (Tr. 2286).

On recross-examination by Sidney Feldshuh, Arden was shown two exhibits with his signature and his wife's signature on them (Frank Xs O for identification and P for identification). Arden said Allen gave him O and P but that he could not recall whether these were the documents shown to him at the SEC and that he was never asked to have "O" or "P" notarized (Tr. 2299-2300).

Mel Hiller testified that he met D'Onofrio in front of the United States Courthouse at Foley Square in the fall of 1973 (Tr. 2318-9). Hiller testified that D'Onofrio told him that he (D'Onofrio) was at the courthouse to deliver bodies, people without faces; that he was being paid $400 per week; that he expected about two years in jail and that he hoped to serve it down in Florida at Eglin Air Force Base; and that he travelled back and forth to and from Las Vegas (Tr. 2324).

Frank then called Bruce Rich, an attorney formerly employed by the SEC (Tr. 2344).* The government stipulated that Moss testified before the SEC on May 27, 1969 and that Frank's Exhibit N was an accurate transcription of that testimony (Tr. 2346). Rich testified that the SEC said the maximum number of shares that could be sold to any one individual was 1,000 shares and that this was set forth by the SEC in January, 1969 (Tr. 2357).

Frank then called Alan Rashes an attorney with the SEC.** Rashes testified that he began an investigation into TWP in about April, 1969 (Tr. 2364-5).

Stoller then called Allen.*** Allen testified that he first met Bonavia in 1958 when Bonavia became a subscriber to Allen's newsletter. He met Stoller in late 1960 or 1961 and worked with him at the member firms of Reuben, Rose & Co. and Lieberbaum & Co. In late 1968 Stoller and Allen

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* Rich had previously been called as a government witness (Tr. 68).

** Rashes had been previously called as a government witness (Tr. 1868).

*** Allen testified the substance of which is discussed hereinabove. On October 18, 1974, he was indicted in five counts of perjury in indictment 74 Cr. 979. On December 23, 1974 Allen pleaded guilty to counts 3, 4 and 5 and admitted that his testimony as a defense witness in the instant case was perjurious. Allen's testimony and its relevance to the legal issues Frank raises, is discussed under Point I, *infra*.

Allen is presently in prison having been sentenced after pleading guilty to four indictments, 73 Cr. 471 (conspiracy to

[Footnote continued on following page]

severed their business but not their social relationship, after working together on the Stoller-Allen newsletter (Tr. 2383-5).

Allen testified that he learned of TWP in the fall of 1968 from D'Onofrio, when he and Stoller met D'Onofrio at Hancock Securities. At the time Stoller and Allen shared an office at 118 E. 60th Street. Allen had known D'Onofrio since 1966 or 1967 (Tr. 2386-8).

D'Onofrio told Allen that TWP was a vocational training company for underprivileged children and that TWP was going to do a Regulation A self-underwriting (Tr. 2389, 2392-3). At D'Onofrio's instruction Allen researched the company (Tr. 2389). Allen testified that he met with Moss and Herzfeld and discussed the affairs of the company with them (Tr. 2390).

Allen, at the time, served Bank Hofmann in an advisory research capacity and received 5% of the profits made by clients of the bank on securities Allen suggested the bank buy for its clients. Stoller also had a similar relationship with the bank (Tr. 2391).

In December or January, 1969, Allen told Herbert at Bank Hofmann that Allen liked the possibilities of TWP and that if the contracts materialized, TWP, although highly speculative, could be an exciting company. Allen said Herbert told him that D'Onofrio had mentioned the TWP offering. Herbert also said that he wished there were more stock because it would be difficult for the bank to buy it if there were a limited number of shares (Tr. 2993, 2396-7). Allen testified that the first time he saw the indication letter (GX 4) was in the office of Assistant United States Attorney Ira Sorkin in January, 1974; that he did not remember seeing it in 1968; and that he had nothing to do with preparing the letter or the circumstances surrounding its preparation (Tr. 2395-6).

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transport stolen property in interstate commerce); 73 Cr. 747 (conspiracy to violate the federal securities laws); 74 Cr. 159 (the instant indictment); and the above-mentioned perjury indictment, 74 Cr. 979.

In January, 1969, Allen and Stoller met D'Onofrio. D'Onofrio said that the offering was 40,000 or 42,000 shares at $7. Allen then advised Herbert by telephone. Herbert replied that the bank could not buy a large block because D'Onofrio or Moss had been told that the SEC said no one person should be permitted to buy more than 1,000 shares. Herbert then asked if Allen and Stoller could buy stock and the bank would pay a premium. Herbert also said that if he and Stoller could buy stock or get people to buy a block, the bank would pay $10 per share. Therefore they would have no risk, since the stock was being sold at $7 per share and they would still share in the profits (Tr. 2398-2400).

After speaking to Herbert, Allen asked his wife Janice, Joseph Arden, Sarah Striziver and Willard La Morte to indicate for 1,000 shares each. If they received the 1,000 shares, Allen said he had agreed to buy it from them at $8¼ or $8½ per share. Allen also said he indicated for 1,000 shares himself. Allen further told Stoller of the conversation with Herbert and asked Stoller to get people to indicate for him. Stoller said he would try. In fact, Stoller later told Allen that Stoller got his mother, mother-in-law, Talansky and wife to indicate. Stoller also found five people to indicate for a total of 5,000 shares (Tr. 2400-3).

After each of Allen's nominees received 1,000 shares, Allen had each of them sign the back of the certificates, deliver the certificates to him and he paid each of them $8¼ per share (Tr. 2405).

Upon receipt of the certificates Allen either mailed them to Switzerland or gave them to D'Onofrio or Stoller to bring over. Allen had typed or had prepared certain bills of sale (App. Xs O and P) and either sent them to Switzerland with the certificates or independent of the certificates. Allen got Arden and Striziver to sign their bills of sale. After Allen sent the bills to Switzerland, Herbert told Allen that they needed other bills of sale verified or notarized to

show that Allen had bought the shares from his nominees. Since Allen was under indictment in February 1969, Herbert told him to get his receipts notarized. Allen then had Frank notarize them (Tr. 2405-6, 2416-20). Allen then testified that he prepared Stoller's receipts (GX 26-31) and gave them to Stoller so that Stoller's people could sign them. As far as Allen knew, Stoller had them signed (Tr. 2405-11).

When Bank Hofmann received the certificates, they confirmed the receipt to Allen by phone. Allen told the bank to send the check for $50,000. (5,000 shares at $10 per share) minus commissions. Allen received the check which he deposited in his account at the Royal Bank of Canada. Stoller told Allen that he also had received such a check and deposited it in the bank (Tr. 2413-5).

After March 5, 1969, Stoller and Allen met Bonavia at 118 E. 60th Street. After reviewing Bonavia's holdings and telling Bonavia that TWP could be another Franklin Mint with the McGraw-Hill contract, Bonavia told Allen to buy him eight or ten thousand shares. Allen told Bonavia that he would have to place the order, and Bonavia said he would (Tr. 2422-3).

In late March, 1969, or the beginning of April, 1969, Bonavia told Allen that he had purchased TWP and he had given Bank Hofmann open sell orders at higher prices. In April, 1969, Bonavia saw Allen and told Allen that he (Bonavia) wanted to find out if the McGraw-Hill contract was going to materialize (Tr. 2426-2428).

From January 1969, through June, 1969, Allen spoke to Eleanore Wein, whom he had known since 1965, and possibly Walter Paruch (Tr. 2428-9). In or about April, 1969, Allen spoke to Wien and told her that TWP could be another winner like Franklin Mint (Tr. 2432).

In 1961 or 1962 Bonavia told Allen he was interested in opening a secret coded account at Bank Hofmann so he would not go to jail like his former partner for income tax evasion. Neither Stoller nor Allen had anything to do with opening the account. Allen further testified that it was Bonavia who said he obtained the name "Barbin" from a manicurist to whom Allen was introduced by Bonavia (Tr. 2433-5).

Allen denied that he and Stoller extorted $65,000 from Bonavia and that he gave confirmations to Bonavia which Allen saw at Bonavia's home (Tr. 2436-7). Allen said the $65,000 was Stoller's and Allen's percentage of the profits on Franklin Mint (Tr. 2439).

Allen denied that he heard Stoller say that Stoller was going to run TWP to 100, split it and run it to 100 again. Allen also denied that he ever heard anyone say to Bonavia that TWP had a $25 million McGraw-Hill contract (Tr. 2441-2).

Allen denied that he or Stoller told Bonavia that TWP had been put in Bonavia's account (Tr. 2443-4).

Allen denied that he ever participated in a conversation where Stoller told Bonavia that since TWP and McGraw-Hill had a $25 million contract, Bonavia should buy the stock. Allen denied that he had ever heard Stoller tell Bonavia that Stoller would have Moss removed as president (Tr. 2444). Allen denied that D'Onofrio, in the presence of Allen and Stoller, told Bonavia that they had done a bad thing by putting TWP stock in Bonavia's account (Tr. 2445). Allen denied that he had participated in a conversation with D'Onofrio, Stoller and Bonavia where D'Onofrio said he would give 100,000 shares of TWP to Bonavia to make up the loss (Tr. 2445). Allen denied that he and Stoller had offered to sell 10,000 shares of TWP for Bonavia (Tr. 2446). Allen denied that he had had a conversation with Feeney, Stoller and D'Onofrio to discuss plans

for dealing with the price of TWP (Tr. 2446). Allen denied that he had told Feeney at the Hotel Nova Park that he was going to remain a fugitive and not return to the United States (Tr. 2447).

Allen denied that he or Stoller had ever given D'Onofrio the forms for opening an account at Bank Hofmann (Tr. 2448). Allen denied that Stoller, in a conversation with D'Onofrio, had told D'Onofrio the advantages of opening a Swiss bank account (Tr. 2449). Allen denied being at the Baur Au Lac Hotel on June 6, 7 or 8, 1968 (Tr. 2449). Allen denied that he had ever tried to persuade Stoller to accept Pfingst as a partner or that he was a partner with Pfingst or D'Onofrio on TWP or that he or Stoller had had any arrangement on TWP (Tr. 2450).

Allen denied having any meetings with Frank in September 1968 during which TWP was discussed (Tr. 2451-2).

Allen denied that there had been a meeting in Frank's office in November, 1968, where the indication letter was mentioned to Frank (Tr. 2456). Allen denied that at this meeting Frank had said the deal should be done in a different way through nominees and that Frank wanted $15,000 plus 1,000 shares (Tr. 2456-7). Allen denied that there had ever been a meeting at the Camelot Restaurant (Tr. 2457). Allen denied that there had been a meeting in Frank's office on or about February 2, 1969, where Frank told D'Onofrio that D'Onofrio should get over 100 stockholders (Tr. 2458). Allen denied that there had been a meeting with Stoller and D'Onofrio where he and Stoller had said it was time to cross the stock to Bonavia and Weissinger (Tr. 2458). Allen denied that he had ever had a conversation with anybody about crossing the stock to Bonavia and Weissinger (Tr. 2458). Allen denied that there had been a discussion in Frank's office regarding the notarization of the bills of sale (Tr. 2459). Allen stated

that the problem with notarization related to his nominees (Tr. 2460). Allen denied discussing with Stoller and D'Onofrio in April, 1969, the touting of TWP (Tr. 2460). Allen denied that there had been a discussion with Stoller in April, 1969, at which Stoller said they should call Eleanore Wien Goldinher (Tr. 2461). Allen denied that it was D'Onofrio who told him about the crank letter sent to the SEC (Tr. 2462). Allen denied that he had ever attended a meeting in Frank's office in June or early July, 1969, at which Frank "blew his top" when he found out that Stoller had testified and perjured himself at the SEC. Allen testified that he heard this from Assistant United States Attorney Sorkin (Tr. 2462-3). Allen denied that he had ever heard Stoller threaten to kill or bury Bonavia (Tr. 2466). Allen testified that he did not remember any discussion with Bonavia about Bonavia testifying before a grand jury (Tr. 2467-8).

Allen testified that he saw D'Onofrio on three or four occasions in the courthouse during 1974. On one occasion while D'Onofrio was handing in his voucher, he told Allen that he was staying at the Plaza Hotel with a woman named Sandy. On another occasion Allen testified that D'Onofrio had told him that he (D'Onofrio) was going to be named as an unindicted co-conspirator and Allen should play it smart, cooperate with the Government and "go their way after the indictment in this case." Allen testified he had met D'Onofrio outside the office of Assistant United States Attorney Sorkin and had told D'Onofrio that he considered it and that Allen was named as a defendant and D'Onofrio only as a conspirator. D'Onofrio replied that he was cooperating with government; that in order to take pressure off himself he would testify with the assistance of Assistant United States Attorney Sorkin that Frank, Stoller and Allen structured the entire TWP deal. Allen testified that D'Onofrio had to say it that way and if Allen was smart he would say what the Government wanted him to say and not contradict D'Onofrio's testimony. If Allen fought the

government, Allen would get consecutive sentences (Tr. 2468-75).

Allen testified he had met Feeney in August, 1973, at the Gaslight Club and also in the hallway outside Sorkin's office in approximately August, 1974. During the 1973 meeting, Allen said he had told Feeney that he had been down to Assistant United States Attorney Sorkin's office without an attorney; that Sorkin was putting pressure on him; and that Sorkin was going to name him in a number of indictments. Allen said that he did not deserve to be named in the Coatings indictment.* Allen said he had told Feeney that Sorkin had said that if Allen cooperated to get Frank, Allen would not be named as a defendant (Tr. 2476-7). Allen testified that in July or August, 1974, he had met Feeney outside Sorkin's office and Feeney had said that Sorkin was "preping" him on TWP (Tr. 2479-80).

On cross-examination Allen said that he had told the truth to the office of Michael Eberhardt, an attorney with the Organized Crime Strike Force,** but had said what Sorkin wanted him to say by structuring the facts for him (Tr. 2512) and that he had lied on Sorkin's behalf (Tr. 2514). Allen testified that he had told his lawyer about Sorkin structuring his testimony when Sorkin asked him to make tapes in mid-February, 1974 (Tr. 2518-9). Allen also testified that he had written letters to Judges Gurfein and Carter*** in which he claimed he had been threatened

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* Indictment 73 Cr. 747 On March 6, 1974, Allen pleaded guilty to a conspiracy to manipulate the price of Coatings Unlimited, Inc. securities before the Honorable Murray I. Gurfein, then a United States District Judge.

** Eberhardt was in charge of the prosecution of indictment 73 Cr. 471, *United States* v. *Badalamente, et al.*, 507 F.2d 12, (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975).

*** The latter was referred to in *United States* v. *Badalamente*, *supra*. The letters are discussed further in Point I of this Brief hereinbelow.

(Tr. 2524; GXs 38 and 39) and he also had told others of the threats (Tr. 2520, 2523).

Allen testified that on December 4, 1973, he had been arrested by the Swiss for bouncing a check to a Swiss jeweler (Tr. 2541). While in jail he wrote two other letters to Assistant United States Attorney Sorkin (GXs 41 and 42) which Allen said his Swiss lawyer had told him to write (Tr. 2542-3). Allen testified that while he was in a Swiss jail, he had been threatened by Dick Rand, ("Rand"), a member of the United States Embassy.* Allen testified that Rand had told him that unless Allen waived extradition, returned to the United States and cooperated with the United States Attorney's office, pressures would be exerted to see that Allen got the maximum sentence of two years in a Swiss jail (Tr. 2543-4, 2572, 2703).

Allen testified that Assistant United States Attorney Sorkin began structuring his testimony on January 15, 1974, the night Allen returned from Switzerland (Tr. 2596).**

Allen testified that from January 15, 1974 to August 15, 1974 he had spoken to Doonan about sixty times and that he had told him the truth. Five to eight of those sixty conversations concerned TWP (Tr. 2605-7).***

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* Rand was called as a rebuttal witness, as is discussed below.

** Allen repeatedly made the claim that Assistant United States Attorney Sorkin had structured his testimony (Tr. 2596-7, 2607-10, 2612-14, 2655, 2657-66, 2731, 2936-40). Allen later pleaded guilty to perjury in connection with his testimony as a defense witness and admitted that AUSA Sorkin did not structure his testimony. (Count 5 of 74 Cr. 979).

*** Allen pleaded guilty and admitted that he had perjured himself with respect to the number of times he spoke to Doonan about TWP and testifying that AUSA Sorkin told him what to say (Count 4 of 74 Cr. 979).

Allen testified that he was moving to vacate his guilty pleas on Indictments 73 Cr. 747 and 74 Cr. 159 on the grounds that he was not guilty (Tr. 2625).*

Allen testified that the term "swimming pool" was a code name just between Feeney and himself (Tr. 2636) but he did not remember mentioning it to Stoller (Tr. 2655).**

On cross-examination Allen admitted that his account at Bank Hofmann was named "Erika" (Tr. 2676); that Stoller's account was code named "Shirley" (Tr. 2680); that D'Onofrio's was code named "Gypsy" (Tr. 2683); and Frank's was code named "Lance" (Tr. 2684).

Allen testified that he never had a conversation with Frank during which he told Frank that he had transferred $15,000 from account "Erika" to account "Lance" and that he did not remember having a conversation with Frank during which he said he had had a confirmation slip showing the transfer from "Erika" to "Lance". Allen said the $15,000 was repayment of a loan to Al Brodkin (Tr. 2749-54). Allen testified that he did not remember Frank at any time telling Allen that Frank had received $15,000 for telling him how to do the TWP deal, saying it was repayment for the Brodkin loan (Tr. 2870).***

Allen testified on direct examination that he had had his people endorse the certificates (Tr. 2405). On cross-

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* During the trial, Allen filed an affidavit in support of his motion in which he charged, in substance, Assistant United States Attorney Sorkin with the same conduct he was alleging from the witness stand. On December 14, 1974, Allen withdrew his motion.

** This too is an obvious lie because the Stoller tape of a conversation between Allen and Stoller GX 101A makes reference to the "swimming pool".

*** See Point I hereinafter with respect to this testimony.

examination, he testified that in mid-February, 1969, he had received the certificates and paid his nominees (Tr. 2776).* Allen testified that his understanding of a nominee is someone who buys stock in another's behalf as a favor or for other reasons; that Striziver, Arden, La Morte and Hickok were buying stock in his behalf and that he was aware that the SEC had said that no one person should be permitted to buy more than 1,000 shares (Tr. 2803-7).

Allen testified that the last time he had seen Bank Hofmann records was in 1967, but that AUSA Sorkin had showed him some records in Sorkin's office (GX 112). Allen testified that these records (GX 112) had not been turned over to Doonan (Tr. 2838-9, 2843).

Allen identified certain records given to him by Bank Hofmann (GXs 33, 34 and 35).** Allen testified that his 5,000 shares went into his account "Erika" (Tr. 2848).

On redirect examination Allen repeated that AUSA Sorkin threatened him, coerced him and told him to lie (Tr. 2908-2957).

When Allen completed his testimony, Judge Tyler on motion of the government, and after colloquy between the Court and all counsel (Tr. 3074-98), instructed the jury to disregard "all those questions answers having to do with Frank. . . That is the testimony of Allen regarding Frank on both direct and cross is stricken and must be disregarded by you in deciding this case" (Tr. 3170).***

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* Accordingly, Allen's 5,000 shares never were traded in the market, but in fact, were sent from the transfer agent directly to the nominees who, in turn, had them endorsed or guaranteed and turned them over to Allen in return for Allen's check.

** These records are similar in nature to D'Onofrio's receipts (GXs 11, 12 and 13).

*** See Point I hereinbelow.

Frank called Willard La Morte who testified that Allen had asked him to purchase 1,000 shares of TWP and after the issue came out, La Morte would buy 200 shares for himself and Allen would buy the 1,000 shares at $1 to $1.50 per share profit (Tr. 2491-3).

After Allen purchased the 1,000 shares (Tr. 2497), he went to La Morte and told him that he needed proof of ownership of the stock, Allen prepared a document for La Morte to sign (Tr. 2500-1). La Morte testified he signed two documents. The second document was signed and notarized at Frank's office. La Morte identified the document as GX 23 (Tr. 2501-4).

On cross-examination La Morte testified that he had bought 200 shares in his wife's maiden name Migion S. Sisson and 100 more shares in the name of the Willard J. La Morte partnership account (Tr. 2506-7). La Morte said he owed the law firm of Feldshuh and Frank $5,000 or $6,000. (Tr. 2507).

Stoller called Joseph Pfingst who testified that D'Onofrio was his client in 1968 and 1969 and that he went to Switzerland on June 6, 1968 with D'Onofrio (Tr. 2975-6). Pfingst said he learned of TWP in July, 1968, after the first trip to Switzerland. He said he met Stoller and Allen at the Baur Au Lac Hotel but did not recall any discussion of TWP (Tr. 2977-80).

Pfingst testified that he did not recall discussing TWP with D'Onofrio on the plane to Switzerland (Tr. 2981, 2985). Pfingst said he did not recall and never heard of any conversation at the Baur Au Lac Hotel where the TWP was first discussed (Tr. 2987-8, 2990, 2992-3). Pfingst also testified that he has never seen the indication letter (GX 4) nor had he participated in its preparation (Tr. 2993-4).

Stoller called John Grimes, an attorney employed by the firm of Shea, Gould, Climenko & Kramer. Grimes testified that he had prepared certain charts from Stoller Exhibit AA the results of which are reflected in Stoller Exhibit AD (Tr. 3002-3).

D. The Government's Rebutial Case

The Government called Dick Rand, a career foreign service officer of the United States, assigned to the United States Embassy in Berne, Switzerland (Tr. 3008). Rand testified that on December 10, 1973, he received a telephone call from Michael Weiler, Allen's Swiss lawyer. On December 13, 1973, he received a letter from Allen (Tr. 3009-11; GX 124).

On December 15, 1973, after receiving calls from Weiler, Rand visited Allen in the Swiss jail (Tr. 3013). Allen had been arrested on December 2, 1973 (Tr. 3020). Rand testified that Weiler had asked that he visit Allen and inquire of Allen whether Allen was *bona fide* in his agreement to return to the United States. Allen told Rand that he wanted to regularize his status with United States authorities (Tr. 3016).

Rand testified that on January 14, 1974, Allen was released to United States authorities who took Allen to the airport (Tr. 3017). Rand testified that he did not put pressure on Allen by telling him that the Swiss would be pressured into keeping Allen in jail for two years or that Allen told him that the Mafia was threatening him not to return (Tr. 3019, 3021-2).

Before Allen left for the United States on January 15, 1974, Rand gave him a letter (GX 125).

On cross-examination Rand testified that he was not instructed to do everything he could to encourage Allen

to come home because Allen had already agreed to come back (Tr. 3035-6).

John Slavinski, a Postal Inspector, testified that he arrested Allen at approximately 4:30 P.M. at Kennedy Airport on January 15, 1974, and brought him to Sorkin's office at the Courthouse. Present were Slavinski, Postal Inspector Al Gray, Allen and Sorkin. Slavinski testified that he and Gray accompanied Allen out of the federal building at approximately 7:00 P.M. Slavinski testified further that there was no discussion in Sorkin's office about TWP while Allen was present (Tr. 3042-5). Postal Inspector Al Gray corroborated Slavinski (Tr. 3054-5).

Sergeant Peter C. Antonielli of the Federal Protective Service introduced into evidence a sign-out sheet found in the lobby of the federal Courthouse showing that Assistant United States Attorney Sorkin signed out at 7:15 P.M. on January 15, 1974 (Tr. 3049-50). The government and defense counsel stipulated that Assistant United States Attorney Sorkin left the Courthouse at 7:55 P.M. on January 16, 1974 (Tr. 3072-3).

Thomas Doonan testified that he never threatened to plant narcotics on Allen's person, in his apartment, in his car or any place; and that Allen gave him GX 122 on March 23, 1974 (Tr. 3061-2). Doonan testified further that on January 15, 1974, he left the Courthouse at 9:00 P.M. and that from approximately 7:15 P.M. until 9:00 there was no one in Sorkin's office (Tr. 3064-6).*

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* Slavinski, Gray, Antonielli and Doonan were offered by the Government to rebut, among other things Allen's testimony that AUSA Sorkin kept him in his [Sorkin's] office until midnight or 1:00 A.M. January 15 and January 16, 1974, structuring his testimony.

ARGUMENT

POINT I

The Post-Indictment Investigation Of Frank's Attempt To Suborn Perjury And Obstruct Justice Did Not Violate The Rule Of *Massiah* v. *United States*, 377 U.S. 201 (1963), And No evidence Obtained From That Investigation Was Introduced Against Frank At Trial. In Any Event, The Frank-Allen Tape Recordings Would Have Been Admissible Against Appellant If He Had Testified In His Own Behalf Which He Chose Not To Do. The District Judge Properly Struck Allen's Perjurious Testimony Relating To Appellant After Allen Had Invoked His Fifth Amendment Privilege On Cross-Examination.

The principal argument advanced on this appeal in support of reversal is that the prosecution allegedly infringed Frank's Sixth Amendment right to counsel during its investigation of his attempt to obstruct justice and suborn perjury. (Br., Point I, at 16-25). By permitting Allen to record conversations with Frank, the Government, according to appellant, allegedly employed a technique "which violated the letter and spirit of *Massiah* v. *United States*, 377 U.S. 201 (1964)" (Br. at 16). Appellant further asserts that the Government's conduct was designed to prevent Frank from testifying in his own behalf (Br. at 19-20). Finally, appellant claims that the District Judge deprived him of due process of law by excluding testimony of Allen favorable to and exculpatory of Frank (Br., Point II, 27-36). These extravagant claims, as we demonstrate below, are patently devoid of merit.

A. The Facts

1. Pre-Trial Events

On February 14, 1974, the indictment was filed in this case. Allen had been cooperating with the Government since January 15, 1974. On February 19, 1974, Allen called Thomas Doonan, a criminal investigator (agent) employed by the United States Attorney's Office, and told Doonan that Frank had asked him to visit Frank's law office to sign a false affidavit to refute the charges set forth in the indictment and in particular those against Frank. Frank also had told Allen that Stoller would be signing a similar affidavit (Sorkin Aff., dated September 30, 1974, served upon the Court and defense counsel on September 30, 1974 and filed with the District Court on October 22, 1974, see index to record on appeal, Item No. 37, p. 4). Allen went to Frank's office where Stoller confirmed that he had signed such an affidavit. Frank provided Allen with a copy of the affidavit to read (GX 42A).* After reading the affidavit, Allen said paragraph 6, among others, was false (Sorkin Aff., dated September 30, 1974, *supra*). Paragraph 6 reads:

> 6. At no time did I ever pay or cause to be paid to Martin Frank the sum of $15,000 or any other monies in connection with any activities in any way related to the securities of Training With The Pros, Inc.

Allen told Frank that paragraph 6 was false because he had given Frank $15,000. Frank counseled Allen to say that the $15,000 was either a legal fee or "something else."

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* Judge Tyler characterized the terms of the affidavit as purporting "to exonerate Martin Frank from any kind of crime on the face of this globe and certainly in respect to the Training With the Pros situation" (Tr. 1656-7).

Allen took the affidavit, ostensibly to show his attorney (Sorkin Aff., dated September 30, 1974, *supra*).

On February 21, 1974, Allen gave the affidavit to Doonan (Tr. 1402). At his (Frank's) arraignment on February 24, 1974, Frank gave the false affidavit to Allen's attorney, Eric Bregman stating, "Here is the affidavit that Jerry talked to you about or that Jerry told you about" (Tr. 1168).

On February 26, 1974, Allen told Doonan that Frank had called him to say that Frank's law partner wanted Allen to sign the affidavit. Allen repeated to Frank that he would not sign a false affidavit. Frank persisted and asked Allen for a statement about the matters discussed in the perjurious affidavit. Frank said his law partner had indicated that if Allen gave such a statement, then Allen would thereafter be unable "to turn state's evidence" (Government's Memorandum of Law, see index on appeal item No. 46, p. 6).

Allen did not provide such a statement and on February 28, 1974, Allen, his attorney Eric Bregman, Assistant United States Attorney Ira Sorkin and Criminal Investigators Thomas Doonan and Carl Bogan met with Thomas Day Edwards, Chief of the Criminal Division. After Allen reported what had occurred, Mr. Edwards asked Allen if he would wear a recording device and record further conversations with Frank concerning the affidavit. After conferring privately with Bregman, Allen agreed to record any such further conversations with Frank (Tr. 1403-4). *Allen was specifically directed by the Government to confine the conversations with Frank to the perjurious affidavit and not to discuss the substance of the securities fraud indictment* (Tr. 1412, 1427).

Frank's brief conspicuously omits any reference to the critical facts set forth above.

On February 28, 1974, at approximately 5:15 P.M., Allen called Frank at Frank's law office. The telephone conversation was recorded on tape (GX 100) and a transcript of the tape was prepared thereafter (GX 101A). During this conversation Frank told Allen to visit him at his office to discuss the affidavit.

On March 1, 1974, Allen was fitted with a recording device and had a conversation with Frank at Frank's office. The conversation was recorded on tape (GX 101) and a transcript of the tape was prepared thereafter (GX 101B).

The tape recordings were made available to the defense in June, 1974, nearly three months before trial and the transcripts were given to defense counsel just prior to trial.*

2. The Frank Tapes And Allen's Testimony

A review of the tapes and Allen's testimony shows beyond peradventure that Allen committed blatant perjury at the trial. The instances in which Allen's testimony is squarely contradicted by the tapes are numerous. The most glaring examples of Allen's tissue of lies are as follows:

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* It should be noted that Frank was given transcripts of the tapes and made certain changes in the transcripts based upon his review of the tapes. For the most part the Government consented to add or delete certain portions of the transcripts which Frank claimed were either inaudible or not accurately transcribed. Those few instances where the Government and Frank disagreed are immaterial to this appeal.

a. On direct examination by Stoller's attorney, Milton Gould, Esq., Allen was asked the following question and gave the following answer (Tr. 2456-7):

> Q. It has been claimed in this case, sir, by a witness that Frank said at that meeting* that the deal should have been done in a different way through the use of nominees and that he, Frank wanted $15,000 plus 1,000 shares. Did anything like that take place? A. No Sir.

The tape of March 1, 1974, (GX 101B) reveals *Frank* admitting to Allen:

> There's no question in my mind, and I know there is none in yours, that you paid me $15,000 for telling you how to do the training deal.—There's no question in my mind. I had to tell you and Ray [D'Onofrio] and Jerry.**

b. On cross-examination by Assistant United States Attorney Sorkin, Allen was asked the following questions and gave the following answers (Tr. 2749-50):

> Q. Did you ever have a conversation with Mr. Frank where you told him that you had transferred $15,000 from your account Erika to account Lance? A. No.
>
> Q. At any time within the past year? A. Not that I can recall. I repaid a debt.
>
> Q. Did you ever have a conversation with Mr. Frank where you told him that you had seen the

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* A meeting in Frank's office in November, 1968 (Tr. 2456).

** Frank concedes in his Brief that the "Jerry" is a mistake. The government and appellant both assume that Frank meant "Phil" [Stoller] (Br., p. 24).

> slip showing the transfer from account Erika to account Lance? A. I don't remember any.

The March 1, 1974 tape, on the other hand, clearly shows that most of the discussion between Allen and Frank concerned a transfer at Bank Hofmann to Frank's account from Allen's account made two or three months after the Training deal (GX 101B, pp. 3-4).

c. On cross-examination by Assistant United States Attorney Sorkin, Allen, after he said, "I remember giving him [Frank] $15,000 to repay a loan where he was a conduit" (Tr. 2750-50A), was asked the following questions and gave the following answers:

> Q. When was that Mr. Allen? When was this conversation with Mr. Frank? A. I don't recall the exact date. I gave Frank $15,000 to get back to a man named Al Brodkin.
>
> Q. A man named Al Brodkin? A. Al Brodkin, yes. I told you about this, you knew about it.
>
> Q. Just a second, we will get to it. When, Mr. Allen, did you transfer the $15,000 or give the $15,000 to Mr. Frank in repayment for this loan? A. It was in '69. I don't remember the exact date.
>
> Q. Who is Al Brodkin? A. Is he (sic) now deceased. He was a friend of mine, a person who lived in Toronto, a former boxer, a tennis player who was sort of a professional investor.

The March 1, 1974 tape discloses that Frank created the Al Brodkin loan story to conceal the true purpose of the $15,000 payment to him. When discussing the transfer slip reflecting the transfer of $15,000 from Allen's account "Erika" to Frank's account "Lance," the following conversation occurs (GX 101B, p. 4-5):

Allen: I know, but how do I explain, if during the trial they show the slip—in view of the statement, showing, debit Erika, which is my account, credit Lance which is yours. And they have Training on it, how do I explain, what do I say in the statement?*

Frank: If you get called. If you get called.

Frank: You asked Al, you asked Al for a loan, Al Brodkin. He didn't want to make it to you because you'd been delaying in paying him back and—

Allen: Al is dead now. Is that the same, Al Brodkin?

Frank: Al came to New York and I ma—gave me the money and I made you the loan, because you, ah, you did pay it back to me.

Allen: How do I say you made me on the loan? You never gave me a loan and how am I?

Frank: Gave it to you right here. In my office.

Allen: You're going, what do I say in this statement—that you gave me a

Frank: And you told me, I don't know if he ever gave (unintelligible)

Allen: Marty they have that slip.

Frank: That slip only has to do with written accounts before the transfer and you were gonna pay me back the loan, but I said no, I don't want, did you know that you gave me a check, to repay that loan, out of your bank account? Did you know that?

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* The term "statement" is a reference to the affidavit.

Allen: I don't think you ever deposited that check though.

Frank: No you told me to hold it.

Further in the transcript, the conversation is as follows (GX 101B, p. 13):

Frank: About the repayment of what the loan was. You went to Al Brodkin and he wouldn't loan you any more money, because he always had difficulty collecting his loans from you. Then he came and he said 'Look, Marty, I'll go to Marty and Al called me,' and said Marty I'll give you the money and you loan it to Jerry, he'll pay you faster than he'll pay me.

Allen: Marty, they're [the Government] not going to believe that.

Frank: Why not?

Allen: Well for one thing, Brodkin's dead.

Frank: Yea.

Finally the tape of February 28, 1974 indisputably establishes that it was Frank who importuned Allen to come to his office and discuss the affidavit so that Frank and Allen could "cover the tracks" (GX 101A, p. 3).

3. The District Court's Ruling Excluding The Tapes From Evidence

On September 25, 1974, Judge Tyler ruled that the tapes were audible and that Allen had not been coerced into participating in the investigation but, on the contrary, "knew full well what was going on. He knew what the agents were up to and he agreed to participate" (Tr. 1653-4). The District Court also found that Frank had attempted "to get Allen to sign [the] affidavit . . . ;" that Allen "reported it to his supervisors in the United

States Attorney's Office;" and then was asked to record conversations with Frank (Tr. 1656-7). Furthermore, the District Court found that Allen had been instructed by the Government's attorneys "not to discuss any subjects other than the proferred affidavit which would exonerate Martin Frank from all crimes high and low particularly in respect to Training With The Pros" (Tr. 1657).

Judge Tyler, however, refused to allow the Government to introduce the tapes in evidence because he concluded that Frank's conduct did not amount to an obstruction of justice, and that, when confronted with facts about Frank's attempt to procure the perjurious affidavit, the Government should have done nothing more than instruct Allen not to communicate with Frank (Tr. 1658-9, 2033-4, 2037). Although Judge Tyler held, that this case "is not on all fours with *Massiah*" (Tr. 2074), he did express doubts as to the advisability of what the Government did (Tr. 2062, 2067).

Judge Tyler appears to have based his decision to exclude the tapes on the ground that since the securities fraud and obstruction of justice indictments had been consolidated (Tr. 2041, 2053)* the concededly relevant evidence on the tapes concerning the obstruction of justice count would impermissibly and ineradicably influence the jury on the securities fraud count. Since the District Judge concluded that the tape "really is its most powerful in having to do with this merits of the stock manipulation

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* The Government argued that since Frank knew of the existence of the tapes and at the very least, the strong possibility that the Government would seek the admission of the tapes, his consent to consolidate the indictments constituted a waiver of his right to object to the admissibility of the tapes on the obstruction of justice indictment (Tr. 2045-2069). The Court, however, ruled that Frank did not waive his right to object to the tape, notwithstanding the fact that he consented to the consolidation (Tr. 1661).

here on trial" (Tr. 1659), the jury could not help but view the tape as "evidence of consciousness of guilt and deep sense of wishing to rip off one source of powerful evidence against the defendant Frank . . . ," rather than as evidence of obstruction of justice (Tr. 1659-60). Judge Tyler summarized his view when he stated that the tape "drips with culpability on the part of Martin Frank as to the Count in which he is named in the basic indictment [74 Cr. 159] in my opinion. It drips with culpability" (Tr. 2046-7, 2061).

4. The District Court's Ruling Striking The Testimony Of Allen Pertaining To Frank

On cross-examination by Assistant United States Attorney Sorkin, Allen was asked the following question (Tr. 2866):

> Q. Did Mr. Frank at any time tell you that he told you how to do the deal on Training With The Pros?

Counsel for Stoller and Frank objected and the question was put again to Allen which yielded the following answers (Tr. 2870):

> Q. Mr. Allen, did Mr. Frank at any time tell you that he received $15,000 for telling you how to do the Training deal? A. No, sir, the 15 was a repayment of a loan.
>
> Q. I didn't ask you that. I ask you again, Mr. Allen, did Mr. Frank at any time tell you that he received $15,000 for telling you how to do the Training deal? A. I don't recall a conversation like that.

At that point the Government showed Allen Government's Exhibit 123 to refresh his recollection * (Tr. 2870-1). When Allen replied that it did not, Judge Tyler excused the jury and cautioned Allen that he "was running the risk of being indicted in a separate charge of perjury unless [he reflected] carefully on what was involved here." Allen then conferred with his attorney amid claims by Frank's attorney that the "entire episode concerning the tape or transcript had no place in the trial." Judge Tyler replied that the defense made the choice to call Allen and that "there comes a time when the Court has to protect itself against fraud, for one thing" (Tr. 2872-4).

After conferring with his attorney, Allen informed Judge Tyler that he would assert his privilege against self-incrimination and refuse to answer the question (Tr. 2881). The Government then completed its cross-examination of Allen without returning to the tape issue. However, the Government reserved the right to recall Allen when and if the issue of impeaching Allen with the March 1, 1974 Frank tape was resolved.

After the Government and defense rested, the Government moved to admit in evidence the March 1, 1974, Frank-Allen tape to impeach Allen, arguing that the defense had known the contents of the tape before Allen was called and by questioning Allen on matters discussed on the tape, ran the risk of the Government using the tape to impeach Allen (Tr. 3075-7). Alternatively, the Government further argued that as a practical matter Frank and Stoller had presented a unitary defense, whereby witnesses called by Stoller gave testimony directly bearing on Frank's defense and Frank participated in cross-examining a Government

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*GX 123 is a Xerox copy of the March 1, 1974 Frank-Allen tape, GX 101B. The transcript specifically refers to such a conversation. See Point I No. A 2 *supra*.

witness who was called for the sole purpose of impeaching Allen (Tr. 3077-8, 3086-7).

Judge Tyler ruled that rather than allow the Government to use the Frank tape to impeach Allen, he would instruct the jury that they must not consider Allen's testimony relative to Frank (Tr. 3098, 3169-70).

B. The *Massiah* Claim

1. The Post-Indictment Investigation Of Frank's Attempt To Suborn Perjury And Obstruct Justice Did Not Violate the Rule of *Massiah v. United States*, 377 U.S. 201 (1963) And No Evidence Obtained From That Investigation Was Introduced Against Frank At Trial

In *Massiah* v. *United States*, 377 U.S. 201 (1964), the Supreme Court held that the defendant's right to counsel guaranteed by the Sixth Amendment was infringed

> "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206.

Writing for the majority, Mr. Justice Stewart carefully explained that this ruling should not be read in a fashion which would hamper legitimate law enforcement investigation even after an indictment has been filed:

> "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant has already been indicted. All that we hold is that the defendant's own incriminating

> statements obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial." (*Id.* at 207; emphasis in the original).

"The circumstances . . . disclosed" in *Massiah* were as follows: Massiah, a co-defendant named Colson, and others had been charged in a superseding indictment with conspiracy to violate the federal narcotics laws and Massiah and Colson also had been charged with substantive narcotics offenses arising out of a scheme to import narcotics concealed on a ship which arrived in New York from South America. After the superseding indictment had been filed, Massiah, who had retained an attorney, pleaded not guilty and was released on bail, along with Colson. A few days later, and without Massiah's knowledge, Colson decided to cooperate with the Government in their continuing investigation of the narcotics activities in which Massiah, Colson and the others had allegedly been engaged. Colson permitted an agent to install a radio transmitter in the front seat of Colson's car which enabled the agent, equipped with a receiving device, to overhear from some distance away conversations carried on in Colson's car. Thereafter, Colson and Massiah had a lengthy conversation while sitting in Colson's car which, without Massiah's knowledge or consent, was overheard on the radio by the agent who sat in a car parked out of sight down the street. Massiah made several incriminating statements during the conversation which, through the agent's testimony, were later admitted in evidence against him at his trial.

It is abundantly clear that what the Supreme Court condemned in *Massiah* was the conscious effort to develop incriminating evidence of Massiah's participation in the crimes charged in the superseding indictment by surreptitiously eliciting admissions from him after he had retained counsel to represent him in that case. It is equally clear

that *Massiah* is applicable only where that kind of incriminating evidence is developed by such means *and* is introduced against the defendant at his trial during the Government's case-in-chief.

Since *Massiah*, it has been repeatedly held that a pending indictment does not bar the Government from investigating a defendant's post indictment activities constituting separate and distinct offenses from those with which he has been charged and obtaining inculpatory statements concerning such offenses from him during the investigation. See *Hoffa* v. *United States*, 385 U.S. 293, 309-10 (1966); *United States* v. *Hayles*, 471 F.2d 788, 791 (5th Cir.), *cert. denied*, 411 U.S. 969 (1973); *United States* v. *Osser*, 483 F.2d 727, 730-34 (3rd Cir. 1973); *United States* v. *Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); *United States* v. *Missler*, 414 F.2d 1293, 1303 (4th Cir. 1969); *United States* v. *Edwards*, 366 F.2d 853, 872-73 (2d Cir. 1966), *cert. denied*, as *Jakob* v. *United States*, 386 U.S. 908 (1967); *Vinyard* v. *United States*, 335 F.2d 176, 184-85 (8th Cir.), *cert. denied*, 379 U.S. 930 (1964).

The present case is a far cry from *Massiah*. Here, the Government did not "deliberately elicit" from Fank admissions concerning the pending indictment; the Government, as the facts clearly reveal, was conducting an investigation into an attempt by Frank, a member of the bar, to suborn perjury and obstruct justice. It was Frank who called Allen on February 19, 1974 and gave Allen the perjurious affidavit; it was Frank who gave a copy of the affidavit to Allen's attorney, Eric Bregman; it was Frank who continued to pressure Allen on February 26, 1974, to sign the perjurious affidavit; it was Frank who on February 28, 1974, told Allen to come to his office to discuss the affidavit and "cover the tracks;" and it was Frank who, in his conversation with Allen on March 1, 1974, attempted to manufacture fictions about the transfer of $15,000 to Frank which clearly was relevant to the substance of para-

graph 6 of the affidavit. On the record before this Court, any claim that the *Massiah* principle governs this case must be regarded as frivolous.

Furthermore, Frank is not entitled to invoke *Massiah*, since none of the tapes were introduced against him during the Government's case in chief.

2. In Any Event, The Frank-Allen Tapes Would Have Been Admissible Against Appellant If He Had Testified

In the present case Frank's attempt to suborn perjury and obstruct justice were separate and distinct crimes from those for which he had been indicted, namely, conspiracy, securities fraud and mail fraud. Accordingly, the tape recordings that the investigation yielded were admissible at the trial of the obstruction counts.

Moreover, the evidentiary use of the tapes would not have been limited to the obstruction counts. The tapes also were admissible on the pending fraud counts as well, since Frank's attempts to impede and prevent Allen from testifying evidenced consciousness of guilt with respect to the fraud charges. *United States* v. *Alberti*, 470 F.2d 878, 882 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); *United States* v. *Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973). In addition, there was *unsolicited* incriminating statements on the tapes by Frank* which would have been admissible on the underlying indictment (74 Cr. 159) as *spontaneous* admissions made to a

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* Particularly true of this characterization is Frank's remark: "There's no question in my mind, and I know there is none in yours, that you paid me $15,000 for telling you how to do the training deal. There's no question in my mind I had to tell you and Ray and Jerry."

government informant. *Hoffa* v. *United States*, 385 U.S. 293, 303-304 (1966). See also *United States* v. *Kaylor*, 491 F.2d 1127 (2d Cir. 1973); *United States* v. *Gaynor*, 472 F.2d 899 (2d Cir. 1973); *Garcia* v. *United States*, 377 F.2d 321 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967); *Hurst* v. *United States*, 370 F.2d 161 (5th Cir.), *cert. denied*, 387 U.S. 910 (1967). Under these circumstances the Government correctly consolidated the two indictments (the earlier fraud indictment and the later obstruction of justice indictment) for trial.

Judge Tyler's decision at trial to exclude the tapes was not based on governmental impropriety or coercion of Allen, but, rather, was premised on what he considered was the prejudicial joinder of the fraud counts with the obstruction counts. The trial judge believed that the jury would have been unable to limit Frank's taped admissions to the obstruction of justice counts and ignore them when considering the fraud counts. Accordingly, the tapes were not received in evidence.

Judge Tyler's decision, made over the Government's emphatic objection, eliminated any possible genuine *Massiah* issue on appeal.

Nevertheless, Frank argues that his case was prejudiced by the mere existence of the tapes because his own incriminating words contained on the tapes deterred him from testifying in his own behalf. Stripped of its legal trappings, this argument really amounts to nothing more than the brazen suggestion that Frank should have been permitted to commit perjury by denying any criminal involvement in TWP, and more particularly, the $15,000 payoff, without the risk of being impeached by the tapes. This claim, which Frank belatedly raised after trial, understandably was not received with sympathetic consideration by the District Court and, as reiterated on this appeal, has not gained any luster.

At trial, Frank did not challenge the tapes on the ground that they prevented him from taking the witness stand nor did he seek a ruling with respect to whether the prosecution could properly use them for purposes of impeachment. When the "impeachment" argument was first raised *after trial* in support of a Rule 29 motion, it was rejected out of hand by Judge Tyler for basically the same reasons advanced in *Harris* v. *New York*, 401 U.S. 222 (1971) (Transcript of Sentence, December 6, 1974; Tr. 3689-93).

The trial court could have decided that Frank's objection made after trial was not timely. Further, the trial court could have decided that Frank's objection was not untimely, but also was moot, since Frank had not testified and therefore had not been impeached. The trial court, however, ignored the questions of waiver and mootness, perhaps to underscore Frank's effrontery in asserting the claim, and rejected it on the merits.

Harris v. *New York, supra,* is dispositive of Frank's argument and was correctly applied by the District Court. Even assuming *arguendo* that the tapes were inadmissible in the Government's case in chief and further assuming *arguendo* that Frank had reasonably and properly sought a ruling on this issue at trial, Judge Tyler would have been obligated to allow the Government to use the tapes for impeachment purposes under *Harris.** In *Harris*, the Supreme Court held that a statement inadmissible on the prosecution's case in chief because the defendant had not received proper *Miranda* warnings could nevertheless be used to impeach the defendant when he took the witness

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* On appeal, Frank concedes that "the tape recording which was made of his conversation with Allen, could be introduced, at the very least, for the purposes of impeaching his credibility" (Br. at 18).

stand and offered testimony which was partially contradicted by the statement. The Court in *Harris* relied on *Walder* v. *United States*, 347 U.S. 62 (1954) which held that evidence obtained in violation of the Fourth Amendment could likewise be used for impeachment purposes. In *Walder* the Court declared that it was not prepared "to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." *Id.* at 65.

> "There is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *Id.*; see also *United States* v. *Blackwood*, 456 F.2d 526, 529 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972).

Although *Walder* involved the Fourth Amendment while *Harris* involved the Fifth Amendment, the Court held that this distinction did not constitute a "difference in principle" warranting a different result. 401 U.S. at 225. Nor is there any "difference in principle" between the present case, purportedly involving *Massiah*, and *Harris*, which involved *Miranda*. See *United States* v. *Hayles*, *supra*, 471 F.2d at 791. *Harris* holds that while "Every criminal defendant is privileged to testify in his own defense or to refuse to do so . . . that privilege cannot be construed to include the right to commit perjury." 401 U.S. at 225. See also, *Oregon* v. *Haas*, 43 U.S.L.W. 4417 (March 19, 1975).

The only possible question remaining is whether, as *Harris* instructs, the evidence which could have been used to impeach Frank would be deemed trustworthy according to applicable legal standards. The trustworthiness of Frank's taped remarks are beyond dispute. The trial court concluded that Allen's cooperation in recording Frank's

remarks was voluntary and that the tapes themselves were authentic and accurate records of the conversations they purported to describe. Finally, there is nothing in the record to suggest that Frank's taped statements were in any way coerced or otherwise involuntary or inaccurate.

In sum, Frank's argument that he was improperly kept off the stand by the tapes is pure sophistry and does not merit the serious attention of this Court.

In fashioning Frank's legal claims discussed above, appellate counsel regrettably has found it necessary to omit facts which bear adversely and decisively on the issues he has raised (See pp. 55-61, *supra*). It is equally lamentable that he has seen fit to embroider his legal arguments with an attack on the Assistant United States Attorney in charge of this case, apparently in order to divert attention from the utter lack of merit of the claims asserted.* Where,

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* The brief invites this Court's attention to *United States* v. *Badalamente*, 507 F.2d 12 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975) and in particular to the footnote at pages 16-17 concerning a letter written by Allen to Judge Robert F. Carter. The brief offers no explanation for its assertion that *Badalamente* is "pertinent" (Br. at 24) to the present case, and none is discernible. If the reference to *Badalamente* is offered as proof of alleged misconduct on the part of Mr. Sorkin—as it seems to be—, we think it important to set forth the relevant facts which the record in that case did not disclose.

First, neither Assistant United States Attorney Sorkin nor for that matter the United States Attorney's Office for the Southern District of New York tried the *Badalamente* case, which was an Organized Crime Strike Force prosecution. Second, the letter sent to Judge Carter was one of four letters sent by Allen accusing Sorkin and Criminal Investigator Doonan of misconduct. All of these letters were introduced by the Government at the trial below to impeach Allen (GX's 37, 38, 39, 40) because Allen had written two additional letters (GX's 41 and 42) which clearly contradict the allegations against Sorkin and Doonan. Third, Frank, Stoller, and Allen had planned to turn the case into a "Chicago Seven"

[Footnote continued on following page]

as here, a defense attorney seeks to embellish his argument with sweeping charges of serious misconduct against an Assistant United States Attorney, he should be prepared to present to this Court carefully documented and incontestable proof to support the accusations. This Court is entitled to no less, especially where the accuser, himself a former prosecutor, purports to be a responsible member of the criminal defense bar of this Circuit.

In the present case, there has been a woeful failure to sustain the burden of proving such charges. Every defendant, including a crooked lawyer like Martin Frank,

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trial and "get" the prosecutor. Indeed, Stoller, in the fall of 1973, made claims that former Assistant United States Attorney David M. Brodsky who entered into the agreement with D'Onofrio at the Pentenville Prison (Stoller XA) took a $50,000 bribe to keep D'Onofrio out of jail. Later, Frank, Stoller and Allen planned to open an account at a Swiss bank in Sorkin's name by Frank first obtaining Sorkin's signature from correspondence sent to him by Sorkin, causing Sorkin's signature to be forged on bank records and then, when and if the TWP indictment were filed, holding a press conference or sending copies of the forged bank records to the press and others in an attempt to show that the only purpose of the indictment was to cover up Sorkin's own Swiss bank account. The plan never succeeded because none of the defendants wanted to put up the monies necessary to open the account (Sorkin Aff. dated September 30, 1974, and filed with the District Court on October 22, 1974, see index to record on appeal, Item No. 37). None of the above facts concerning Brodsky and Sorkin was ever disputed by Frank or Stoller.

Finally, and perhaps most importantly, Allen's false testimonial assertions of coercion, threats and subornation of perjury by Sorkin were incorporated into counts three through five of indictment 74 Cr. 979, filed October 18, 1974, the day after the trial ended in this case and which charged Allen with perjury in violation of Title 18, U.S.C. Section 1623. On December 23, 1974, Allen pleaded guilty to the perjury charges contained in counts three through five.

Though fully aware of the facts concerning Allen's guilty plea and sentence (see Br. 17), counsel for Frank has chosen to ignore them in making his accusations.

is unquestionably entitled to effective and zealous representation, but the Constitution does not demand that the tone of such advocacy descend to the level of the defendant's own atrophied ethical standards.

C. The District Judge Properly Struck Allen's Perjurious Testimony Relating To Frank After Allen Had Invoked His Fifth Amendment Privilege On Cross-examination In Order To Preserve The Integrity Of The Proceedings And Protect The Court From Fraud

Frank asserts that it was reversible error for Judge Tyler to strike portions of Allen's testimony favorable to and exculpatory of Frank. The argument is wholly without merit.

Allen's testimony was not stricken, as Frank suggests, because Allen testified about Frank's prior self-serving declarations. (Br. at 27) Nor was Allen's testimony stricken because Allen was Frank's accomplice (Br. at 29). On the contrary, Allen's testimony concerning Frank was stricken because permitting such perjury to be considered by the jury (1) without the benefit of knowing about the contents of the excluded tapes and (2) after Allen had invoked his Fifth Amendment privilege during cross-examination on this subject would have seriously undermined the integrity of the trial and perpetrated a fraud on the jurors and on the Court.

The record indisputably reveals that Allen lied when he said on direct examination that Frank had not planned the TWP deal for $15,000 plus 1,000 shares (Tr. 2456-7), since the tape of March 1, 1974, records Frank telling that he had planned the deal for $15,000 (GX 101B at 9). Allen also lied when he said on cross-examination that he never told Frank he had transferred $15,000 to Frank's

Swiss Account (Tr. 2749-50), since much of the tape speaks of a transfer made to Frank's account two or three months after the TWP deal (GX 101B at 3-4). Allen further lied when he asserted on cross-examination that the $15,000 was a loan to Al Brodkin (Tr. 2750-50a); the "Brodkin loan," as the tape shows, was a fiction devised by Frank to disguise his own "payment" as a "loan" to the deceased Brodkin (GX 101B at 13).

All these falsehoods were known to be lies by the District Court, the prosecutors, the defense attorneys and the defendants. Only the jury at the time was unaware that Allen was lying. Any possible doubt about the perjurious nature of this testimony has been completely removed by Allen's subsequent guilty plea to three perjury counts concerning much of the material that defendant Frank chooses to characterize as "an oasis of favorable material in a desert of unfavorable or neutral matter" (Br. at 36).

In addition to the questions above, Allen also was asked on cross-examination by Assistant United States Attorney Sorkin whether Frank "at any time" had told him (Allen) that he (Frank) had received "$15,000 for telling [Allen] how to do the Training deal?" Allen said he did not recall such a conversation (Tr. 2870).

When this occurred, the Government, within the confines of the District Court's prior rulings, attempted to impeach Allen's testimony by means of the transcript of the tape. This attempt to impeach Allen resulted in Allen answering, "To this subject in general, but not that statement, your Honor," (Tr. 2872).* This District Court then advised Allen to confer with his attorney, since it was readily apparent that such wilfully false testimony could very likely

* The "subject" Allen was referring to was the $15,000 which he falsely claimed was the Brodkin loan. He denied that Frank had made the statement that he [Frank] had received the $15,000 as a payoff for explaining the deal.

result in a perjury indictment. Judge Tyler also recognized that Allen's perjury had become so blatant that the Court had to "protect itself against fraud." Not surprisingly, the District Court concluded that the Government could no longer be "handcuffed" on this matter (Tr. 2874). Out of the jury's presence, Allen, upon advice of counsel, decided to invoke his fifth amendment privilege against self-incrimination on this subject (Tr. 2880).

While it is well settled that a witness before a grand jury may not in certain circumstances decide to answer only some questions, *Rogers* v. *United States*, 340 U.S. 367 (1951), and a witness who testifies at trial may not claim the Fifth Amendment privilege against self-incrimination on matters reasonably related to the subject matter of his direct examination, *see, e.g., Brown* v. *Walker*, 161 U.S. 591, 597-598 (1896), *Brown* v. *United States*, 356 U.S. 148 (1958), Judge Tyler did not even entertain the notion of requiring Allen to answer the questions put to him.

Nor did the district judge believe that Allen should be required to invoke his Fifth Amendment privilege in the jury's presence. Frank argued strenuously at trial that Allen's assertion of the Fifth Amendment rights should not become the basis for a juror's adverse inference, especially when Allen's testimony was not concerned with collateral matters, but actually with matters central to the question of defendant Frank's role in the scheme. Furthermore, there is authority that a prosecutor should not *call* a witness to the stand whom he expects will invoke the Fifth Amendment. See, ABA Standards, the Prosecution Function, 5.7(c). However, in the instant case the government had not "called" Allen as its witness, and if Allen did not respond to the question whether Frank had told Allen that he (Frank) had received $15,000 for his advice on TWP deal, the jury might well have concluded that Allen's testimony on direct concerning this subject was entirely truthful. To permit the jury to draw such an inference in light of the facts disclosed by the tapes would have constituted a fraud upon them as well as on the District Court.

Frank states that "the Government would raise a cry of outrage that would virtually 'raise the proverbial roof' if the District Court had ruled that any testimony of a witness which inculpated appellant must be disregarded . . ." (Br. at 28). Notwithstanding Frank's suggestion that such a situation is absurd, there are circumstances when such testimony, even by a government witness would have to be stricken. When a witness invokes the Fifth Amendment as to collateral matters there is little danger of prejudice. However, when a witness precludes inquiry into non-collateral matters by invoking the privilege, then part or all of the witness' testimony should be stricken. *Coil* v. *United States*, 343 F.2d 573 (8th Cir.), *cert. denied*, 382 U.S. 821 (1965); *United States* v. *Cardillo*, 316 F.2d 606, 611 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963); *Fountain* v. *United States*, 384 F.2d 624, 628 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968); *Smith* v. *United States*, 331 F.2d 265 (8th Cir.), *cert. denied*, 379 U.S. 824 (1964). Far from being collateral, Allen's testimony was central, as Frank himself urges.

As a result of Allen's lies and his invocation of the Fifth Amendment privilege, the Government sought to strike all of Allen's testimony. Judge Tyler properly advised the jurors that for "technical reasons" all of the questions and answers relating to Frank were stricken from Allen's testimony. Frank could hardly expect the District Court to permit him to profit from Allen's perjurious testimony.

The course of action taken by Judge Tyler was the only proper one available to him under the circumstances. The Supreme Court has said that "[t]he basic purpose of a trial is the determination of truth . . ." *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966). The striking of Allen's perjurious testimony concerning Frank after he had invoked the privilege against self-incrimination constituted a proper exercise of the District Court's affirmative responsibility and power to insure that this "basic purpose" was not thwarted in the present case. His ruling on this matter should therefore be sustained.

POINT II

Frank Has Not Demonstrated That The Delay Between The Commission Of The Crime And The Filing Of The Indictment Prejudiced His Right To A Fair Trial.

Frank claims that the period of time which elapsed between the commission of the crime and the filing of the indictment prejudiced his right to a fair trial under the Fifth and Sixth Amendments. The argument is completely without substance.

In *United States* v. *Marion*, 404 U.S. 307 (1971) the Supreme Court held that the Due Process Clause of the Fifth Amendment protects a defendant against unreasonable pre-indictment delay if he can establish that the delay prejudiced his right to a fair trial and resulted from prosecutorial misconduct designed to harass or to gain some tactical advantage against him. As this Court's most recent pronouncement on this issue makes clear, *United States* v. *Brown*, Dkt. No. 74-1947 (2d Cir. February 20, 1975), slip. op. 1847, both prejudice *and* prosecutorial misconduct must be proven in order to make out a successful claim under the Due Process Clause:

> "There is a surprising amount of discussion in numerous opinions of various Courts of Appeals in the federal judicial system relating to what might some day be proved or even plausibly alleged by a defendant in a criminal case to justify the dismissal of an indictment for prosecutorial misconduct in failing promptly to seek an indictment. That there must be some such showing is the mandate of *United States* v. *Marion*, 404 U.S. 307, 325 (1971). Here the record is completely bare as to prejudice to the appellant and as to prosecutorial misconduct. The motion for a hearing was properly denied." *Id.* at 1850-51.

The burden of demonstrating substantial prejudice and prosecutorial misconduct has not been sustained in the present case.

The record establishes that the four year eight month delay between June, 1969, when the conspiracy ended and February, 1974, when Frank was indicted, was solely attributable to the lack of evidence necessary to obtain the indictment against him. When the necessary evidence became available to the government, there was no delay in bringing the indictment, notwithstanding the fact that this Court has recognized that even when evidence is available, "Time is needed for investigation and the determination of the need for and extent of criminal charges to be brought, particularly in wide-ranging securities distribution schemes." *United States* v. *Parrott*, 425 F.2d 972, 975 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970).

Frank's claim that D'Onofrio was available to the Government as far back as 1970 totally ignores the fact that D'Onofrio's cooperation was then limited to providing information on the *Pfingst* bankruptcy and bribery cases and did not include information pertaining to his involvement and that of others in securities frauds and Swiss banks.* Indeed, D'Onofrio refused to testify about these areas at the Pfingst bribery trial in June, 1972, even at the cost of Judge Weinstein holding him in contempt and sending him to jail. After the Pfingst trials, D'Onofrio fled the United States and remained a fugitive from late 1972 until May, 1973, when he was captured in London. After waiving extradition he returned to the United States and for the first time began providing information in the

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* See *United States* v. *Pfingst*, 477 F.2d 177 (2nd Cir.), *cert. denied*, 412 U.S. 941 (1973), and *United States* v. *Pfingst*, 490 F.2d 262 (2nd Cir. 1973), *cert. denied*, 417 U.S. 919 (1974), for a recitation of the nature and scope of D'Onofrio's cooperation with the government prior to July, 1973.

areas of securities frauds and Swiss banks.* Before D'Onofrio began cooperating, there was no witness who had knowledge of and was willing to testify about the "inside" details of the TWP fraud. It is not uncommon that complicated securities fraud cases cannot be brought without the cooperation of one of the participants in the fraud. *United States* v. *Koss*, 506 F.2d 1103, 1112 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975). As a result of the information provided by D'Onofrio, among others, Stoller was indicted on November 21, 1973 on six counts of false statements to the SEC (73 Cr. 1050) approximately six months after D'Onofrio had returned from London.

In October, 1973, following the footsteps of D'Onofrio, Allen also fled the United States and became a fugitive in Switzerland. On January 15, 1974, Allen waived extradition, returned to the United States and provided additional information which, together with the information and leads provided by D'Onofrio, resulted in the filing of the indictment on February 14, 1974, approximately eight months after D'Onofrio agreed to cooperate and one month after Allen tendered his cooperation. *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972).

Frank's claim that the United States Securities and Exchange Commission had information sufficient to initiate a criminal case is not supported by the facts. On the contrary, it is clear that the SEC was totally unaware of the

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* Any argument that D'Onofrio was a cooperating defendant in these areas ignores the fact that D'Onofrio, while he was a fugitive was indicted in four securities fraud related indictments; 72 Cr. 884 (August 7, 1972), 72 Cr. 1221 (November 1, 1972); 73 Cr. 191 (March 1, 1973), and 73 Cr. 192 March 1, 1973). When he returned to the United States, he was again indicted on July 9, 1973 (73 Cr. 654).

criminal activities of the appellant and his co-conspirators (Tr. 1887-8). Of the individuals who were either named in the indictment as defendants or co-conspirators, only Moss, Stoller and Arden testified at the SEC.* A significant number of other witnesses, including Allen and D'Onofrio, asserted their privilege against self-incrimination and refused to testify.** The SEC investigation culminated with an administrative proceeding suspending the Regulation A offering of TWP.

Frank urges that Moss' unavailability prejudiced his defense, but in so doing neglects to mention that he was fully aware, at least as early as April 26, 1974, that Moss was ill.*** The Government, in its answer to Frank's motion filed on May 24, 1974, suggested that Frank could readily avail himself of the deposition procedures afforded under Rule 15, F.R. Cr. P. and Title 18, United States Code, Section 3503.**** Inasmuch as Frank did not see fit to avail himself of the deposition procedures in a timely fashion, his claim of prejudice must fail. *United States* v. *Schwartz*, 464 F.2d 499, 505 (2d Cir.), *cert. denied*, 409 U.S. [illegible] (1972). Additionally, although aware of Moss' illness, Frank did not move at any time for a speedy trial, see *United States* v. *Stein*, 456 F.2d 844, 849-850 (2d Cir.),

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* Stoller's testimony was obviously of no help to the SEC inasmuch as he lied.

** It is interesting to note Frank's reaction upon learning that Stoller had not "taken the Fifth" and had testified at the SEC (Tr. 296-301). Clearly, Frank was not the least bit desirous of having the SEC learn about his criminal activities and those of Stoller, Allen and D'Onofrio in the TWP fraud.

*** Frank filed his pre-trial motion to dismiss the indictment on April 26, 1974, in which he acknowledged that he was aware that Moss was ill and might not be available to testify. (Affidavit of Donald A. Defner, paragraph 27, see index of record on appeal No. 10.)

**** The suggestion was made in the context of Stoller's claim that one of his potential witnesses, Joseph Arden, would not be able to testify in his defense because Arden was ill.

cert. denied, 408 U.S. 922 (1972), but, rather, on May 31, 1974, consented to a September 4, 1974, trial date.* Moss died on July 2, 1974.

Even assuming, *arguendo*, that Moss was available to testify and assuming further that his testimony before the SEC was truthful, there is nothing in his testimony favorable to or exculpatory of Frank.

Frank claims that Moss would have testified that he "never discussed" TWP with D'Onofrio prior to the effective date of the offering on February 7, 1969 (Br. at 42-3). Even if he would have so testified, Moss, would have been contradicted at trial on this point by Herzfeld, his business partner, who testified that prior to the effective date, she, D'Onofrio and Pfingst discussed the offering circular (Tr. 1075, 1077).

Frank further claims that Moss would have testified that he (Moss) had five people help him in the public offering of TWP and they did not include Stoller, Allen and D'Onofrio. Frank neglects to point out, however, that *all* of these five people were available to the defense but were never called. Indeed, although Moss had identified Feeney, a Government witness, as one of the five people, Frank did not ask Feeney on cross-examination a single question concerning what, if any, relationship Feeney had with Moss on the TWP offering!

Frank also claims that Moss would have contradicted D'Onofrio. However, the uncontroverted evidence, elicited from not only the Government's witnesses but the defense witnesses as well, shows that Moss was never present at any of the meetings where the defendants formulated their criminal schemes.

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* A pre-trial hearing was held before Judge Tyler on this date. (Pre-Trial Hearing, May 31, 1974; pp. 41-4; see index of record on appeal No. 25).

Frank further claims that Moss would have testified that 61 out of the 130 subscribers on the offering had no connection with the people helping him on the offering and that the only explanation he could offer for the rise in price was the lucrative contracts and publicity. These answers are, however, obviously the logical answers of one who was not privy to the inner workings of the criminal conspiracy hatched by Frank, Stoller, Allen, D'Onofrio and Herbert. It is to be expected that Moss would not know that Delores Abramson and Ruth Pollin were respectively Stoller's mother and mother-in-law and were, in fact, acting as Stoller's nominees and that Frank had advised his co-conspirators to use nominees; or that one important reason why the stock rose in price was because Stoller and Allen were touting the stock to brokers and buying in the open market through Bank Hofmann for the purpose of raising the market price. At best, Moss would have been merely *a* source of information and where such a source who is a co-conspirator dies, even after trial begins, the defendant suffers no prejudice from a pre-indictment delay. *United States* v. *Stein*, *supra*, at 848.

Frank's other claim that the government was unable to state the dates when conspiratorial meetings occurred is nonsense.* The government filed six bills of particulars which fixed the dates of the meetings and conversations referred to in the indictment within days in several cases and certainly within a period of time sufficiently specific so as to provide the defendants with enough information to prepare their defense and not be surprised at trial. See

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* It is apparent that this argument is academic, for Frank's and Stoller's defense consisted principally, through the testimony of Allen and Pfingst, in claiming that none of the meetings and conversations testified to by the government witnesses ever took place. Certainly the defense witnesses did not evidence an inability to reconstruct the events of the offense or any impairment of their recollections. See *United States* v. *DeMasi*, 445 F.2d 251, 255 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971); *United States* v. *Feinberg*, 383 F.2d 60, 65-66 (2nd Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968).

United States v. *Koss*, 506 F.2d 1103, 1113 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975); *United States* v. *Sperling*, 506 F.2d 1323, 1344-45 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3474 (March 3, 1975); *United States* v. *Carroll*, Dkt. No. 74-1138 (2d Cir., January 6, 1975), slip. op. 5963 at 5966.

POINT III

Frank's Conviction On The Conspiracy Count Is Not Barred By His Acquittal On The Substantive Counts.

Frank claims that the substantive offenses of which he was acquitted necessarily encompassed conspiratorial activity, and therefore he was entitled to an acquittal on the conspiracy count as a matter of law. The claim is without merit.

It is well-settled that the commission of a substantive offense and the conspiracy to commit the offense are separate and distinct offenses. *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Smolin*, 182 F.2d 782 (2d Cir. 1950); *United States* v. *Loew*, 145 F.2d 332 (2d Cir. 1944), *cert. denied*, 324 U.S. 840 (1945).

It is clear from a reading of the statutes under which Frank was indicted that not one of the substantive offenses charged requires mutual agreement as one of its essential elements.* Nor does the indictment so allege. Each of the

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* For instance, anyone of the defendants alone could violate Title 15, United States Code, Section 78j(b) and Rule 10b-5 by merely making false statements of material facts to brokers. Examples of this are Allen "touting" Eleanore Wien Goldinher and Stoller "touting" Nathan Hyman.

substantive counts merely realleges the "means" paragraph of the conspiracy count as an illustration of some of the means by which the defendants committed the crimes involved. Additional means of accomplishing both the conspiracy and the substantive offenses were proved at trial for the consideration of the jury whose verdict on different counts of an indictment is not the subject of appellate inquiry. *Dunn* v. *United States*, 284 U.S. 390 (1932); *United States* v. *Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3239 (October 21, 1974); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967). As this Court stated in *United States* v. *Zane*, *supra*, 495 F.2d at 690:

> "The validity accorded to such verdicts recognizes the sanctity of the jury's deliberations and the strong policy against probing into its logic or reasoning, which would open the door to interminable speculation."

Frank's argument is really directed to what he believes was an inconsistent verdict. Assuming, *arguendo*, that he is correct, his position has been consistently rejected in this circuit which has recognized that "even plainly inconsistent jury verdicts, simultaneously rendered are the jury's prerogative," *United States* v. *Zane, supra,* 495 F.2d at 690, and are not grounds for reversal. *Id.*, *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975); *United States* v. *Carbone*, *supra*; *United States* v. *Pandolfi*, 110 F.2d 736 (2d Cir.); *cert. denied,* 310 U.S. 651 (1940); *Dunn* v. *United States*, *supra*. See also *United States* v. *Catalano*, 439 F.2d 110 (2d Cir.), *cert. denied*, 404 U.S. 825 (1971); *United States* v. *Marcone*, 275 F.2d 205 (2d Cir.), *cert. denied*, 362 U.S. 963 (1960).

Frank also advances the patently frivolous argument that the conviction on the conspiracy count is barred by

Wharton's rule. He apparently relies upon this very limited common law doctrine in order to bring himself within the exception to the well-established rule that a conspiracy to commit an offense and the substantive offenses are separate and distinct offenses. *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Wharton's rule merely states that where the substantive crime necessarily involves the mutual cooperation of two or more persons, there can be no conviction for a conspiracy to commit that crime. Anderson, Wharton's Criminal Law and Procedure, § 89, p. 191 (1957); *Gebardi* v. *United States*, 287 U.S. 112 (1932); *United States* v. *Zeuli*, 137 F.2d 845 (2d Cir. 1943). The rule is applied almost exclusively in cases where the essence of the crime is the concerted participation of two parties, such as bribery, *United States* v. *Sager*, 49 F.2d 725 (2d Cir. 1931); adultery, *United States* v. *Dietrich*, 126 F. 664 (C.C.D. Neb. 1904); and harboring a fugitive from justice, *United States* v. *Hagen*, 27 F. Supp. 814 (W.D. Ky. 1939).

In *Pinkerton* v. *United States*, *supra*, 328 U.S. at 643, the Supreme Court limited Wharton's rule, holding that it will apply only ". . . when there is no ingredient in the conspiracy which is not present in the completed crime." Moreover, in a very recent decision, the Supreme Court significantly limited Wharton's rule, stating that "it has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary." *Iannelli* v. *United States*, — U.S. —, 43 U.S.L.W. 4423 (March 25, 1975). Frank would simply have this Court decide that anytime there is cooperation between defendants as a practical matter, or the commission of a substantive offense in furtherance of a conspiracy, there can be no conviction on both the conspiracy and substantive counts. This would be so whether or not the statute states the crime could be committed by one person alone, as the statutes here involved so state.

Frank's reliance on *United States* v. *Zeuli*, 137 F.2d 845 (2d Cir. 1943) is misplaced as the case is inapposite to the proposition for which it is cited. In *Zeuli*, unlike here, the offense was one which required mutual cooperation for its commission, but because the government failed to charge the defendant with a substantive crime, the conspiracy charge had to be dismissed. This Court has clearly limited *Zeuli* to its facts and all attempts to expand upon it have been curtailed. *United States* v. *Central Veal and Beef Co.*, 162 F.2d 766 (2d Cir. 1947); *United States* v. *Locw*, *supra*. Even assuming, *arguendo*, that mutual cooperation were required for the commission of substantive offenses with which Frank was charged, the Supreme Court has recognized an exception to Wharton's Rule where, as here, the conspiracy involves more persons than are required for the commission of the substantive offense. *Iannelli* v. *United States*, *supra*, 43 U.S.L.W. at 4425. This has long been the established rule in this Circuit. *United States* v. *Becker*, 461 F.2d 230, 234 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Vino*, 478 F.2d 35, 38 (2d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); *United States* v. *Benter*, 457 F.2d 1174, 1178 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972); *United States* v. *Smolin*, 182 F.2d 782, 786 (2d Cir. 1950).

Frank's other claim that he was, at most, a "casual facilitator" and not a co-conspirator is so lacking in merit as to border on the ridiculous. Frank offered critical advice to D'Onofrio, Stoller and Allen so that they might commit a myriad of serious crimes without getting caught. His guarantee of signatures and his use of a phony notary were not *ipso facto* conspiratorial as Frank points out. It is axiomatic, however, that acts in furtherance of a conspiracy, taken by themselves, need not be criminal in character. *Yates* v. *United States*, 354 U.S. 298, 334 (1957). In the context of guaranteeing the signature of Allen's nominees and placing his notary stamp on Allen's

receipts for the purpose of persuading Emanuel Deetjen & Co. to transfer the 14,900 TWP shares into "street name" so that the $1 million deal would not collapse, appellant's conduct was as conspiratorial in purpose as any other act committed by any of the other co-conspirators. Most importantly, Frank omits mentioning that nearly all the illegal acts committed by his co-conspirators were done under his counsel. In sum, he committed acts in furtherance of the conspiracy and gave advice in return for a payoff in stock and cash on how to violate the federal securities laws, knowing full well at all times why he was giving the advice and how it was intended to be used by Stoller, Allen and D'Onofrio.

POINT IV

A. The Government Produced All Jencks Act Material Pertaining To The Instant Indictment And Ramon D'Onofrio.

B. The Government Has No Objection To Producing For This Court D'Onofrio's Sentencing Memorandum Submitted To Judge Brieant.

A. Frank claims that the Government "probably suppressed" 3500 material. The claim is without merit.

While it is true that counsel for Stoller filed an affidavit claiming that "documentary information" came to the attention of the defendants "indicating that D'Onofrio was working as a Government informant, agent or informer . . . beginning as early as 1964," suffice it to say that the Government was never shown the alleged "documentary information." Additionally, if such "documentary information" did exist, Frank had ample opportunity to cross-examine D'Onofrio about it. Accordingly, since the defendants claimed they had this "documentary informa-

tion," and it is conceded by the Government that no such material pertaining to D'Onofrio's alleged cooperation since 1964 as an agent or informer was ever disclosed to the defendants, Frank's claim must fail, inasmuch as he and Stoller neither made a claim at trial that the Government "probably" had such material, cross-examined D'Onofrio about such material, *Cf. United States* v. *Sacasas*, 381 F.2d 451, 454 (2d Cir. 1967), nor made a timely demand for its production. *United States* v. *Farley*, 292 F.2d 789, 792 (2d Cir. 1961), *cert. denied*, 369 U.S. 857 (1962). See also *Harrison* v. *United States*, 318 F.2d 220 (D.C. Cir. 1963).

It was the Government's position then, as it is now, that D'Onofrio was not an informant or agent as early as 1964, and therefore no such "3500" material exists. *Cf. United States* v. *Cobb*, 271 F. Supp. 159, 164 (S.D.N.Y. 1967) (Mansfield, *J.*), cited with approval in *United States* v. *Mitchell*, 372 F. Supp. 1239, 1257 (S.D.N.Y. 1973).

Frank claims that the Government suppressed certain memoranda "apparently prepared" by the United States Attorney's Office for the Eastern District of New York pertaining to D'Onofrio's dealings with the United States Attorneys for the Eastern and Southern Districts of New York and the FBI. The claim has no basis in fact.

Prior to trial, Frank requested by letter certain material which he claimed should have been produced during pretrial discovery. In answer to the request, the Government replied that, in substance, all the material was relevant to the *Pfingst* cases and had been disclosed and explored at the *Pfingst* trials, and more particularly, by this Court in *United States* v. *Pfingst, supra*, 490 F.2d 262.

At the trial of the present case, the Government produced thirty-three separate documents under the Jencks Act, pertaining to D'Onofrio (Government Exhibits 3501

(a)-3501(gg)). Frank, although aware that the Government did not produce any of the material requested in the Derfner letter, did not make a timely demand for the material. *United States* v. *Farley, supra.*

B. The Government has no objection to producing, *in camera*, the sentencing memorandum submitted to Judge Brieant at the time of D'Onofrio's sentencing.* The memorandum was divided into four parts: I. Background; II. D'Onofrio's Criminal Activities; III. D'Onofrio's Cooperation with the Government; and IV. Importance of Case to the Enforcement of the Securities Laws. Judge Brieant was correct in concluding that the memorandum does contain material which the Government concedes is Jencks Act material and *Brady* material with respect to Points I and II. However, Judge Brieant was not the trial judge in this case and therefore was not aware that whatever information contained in the memorandum that was Jencks Act and *Brady* material, had already been turned over to the defendants in six Bills of Particulars filed by the Government prior to trial and in the "3500" material produced by the Government at trial. The Government's refusal to produce the sentencing memorandum was based solely upon its belief that to do so might place D'Onofrio's life in jeopardy.

Frank's other claim (Br. at 69) that the Government promised D'Onofrio an eighteen month sentence at Eglin Air Force Base and then suppressed this information from appellant at trial is false. The clear implication is that the Government and Judge Brieant jointly agreed on D'Onofrio's sentence prior to the trial of this case. The implication is false. D'Onofrio was not promised anything by the Government with respect to his sentence. In any event, since Frank admits (Br. at 69) that he knew of this

* It should be noted that this memorandum was not prepared and submitted to D'Onofrio, his counsel, Murray Mogel, and Judge Brieant until after the present trial ended.

allegation from Hiller's testimony at trial, the claim of suppression is groundless. *United States* v. *Stewart*, Dkt. No. 74-2468 (2d Cir., March 26, 1975), slip. op. 2527 at 2532 and the cases cited therein.

The fact of the matter is that D'Onofrio was told that at the conclusion of the trial the Government would ask Judge Tyler to speak to Judge Brieant before D'Onofrio's sentence in view of the fact that Judge Brieant was the sentencing Judge (Tr. 1041). On October 29, 1974, the Government wrote to Judge Tyler asking him to speak to Judge Brieant. Judge Tyler, by letter, replied that he had spoken to Judge Brieant.

POINT V

Frank's Claim That The Court's Charge Was Erroneous In Several Respects Is Entirely Without Merit.

Frank claims that the District Court's charge was erroneous in four respects. His argument is frivolous.

A. The Trial Court did not lead the jury to believe that Frank had threatened Bonavia. The evidence showed that on December 11, 1969, just prior to Bonavia's appearance before the grand jury and immediately after Stoller had told Bonavia that Bonavia's life was at stake if he mentioned Stoller, Allen and Swiss banks to the grand jury, Stoller called Frank and told him that Bonavia had refused to "take the Fifth." Bonavia then got on the phone with Frank who told Bonavia that Bonavia should not involve "us" in Swiss banks (Tr. 1537-41). There is nothing in the District Court's charge from which the jury might infer that Frank threatened Bonavia. Judge Tyler properly charged that the jury was the sole finders and judges of the facts based upon their recollection of the evidence (Tr. 3497).

B. Frank's claim that the Court's charge changed the theory of the case, is discussed in Point VII hereinafter.

C. While the Government consented to the dismissal of paragraph 5(r) of Count One, it was not precluded from commenting upon evidence elicited from D'Onofrio by Frank's trial counsel. It was Frank's trial attorney who asked D'Onofrio if D'Onofrio had paid Frank the $15,000. D'Onofrio answered that he had not but, again, in response to a question by Frank's attorney, answered that he had paid Allen $5,000 which represented D'Onofrio's share of the intended payment of $15,000 to Frank (Tr. 1010). As for the argument that Allen testified that Frank never received the $15,000, the Court is respectively referred to Point I *supra*.

D. The Court properly charged that the jury was the sole and exclusive judge of the credibility of the witnesses (Tr. 3583). Notwithstanding this instruction, the claim that Herzfeld contradicted D'Onofrio is absurd. Herzfeld was only able to testify that in her presence, D'Onofrio introduced himself to Frank. There is nothing in Herzfeld's testimony that would conclusively establish that this was the first time Frank met D'Onofrio. It is reasonable to infer that Frank and D'Onofrio would not acknowledge, in the presence of Herzfeld, who knew nothing of the criminal conspiracy, that they knew one another.

Frank's other claim concerning Pfingst's testimony is so lacking in merit as not to warrant any discussion.

All these matters relating to the credibility of the witnesses were exclusively within the jury's province as triers of the facts and are not subject to review by this Court. *United States* v. *Koss*, *supra*, 506 F.2d at 1111; *United States* v. *Mallah*, 503 F.2d 971, 981 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 25, 1975).

POINT VI

Frank Was Not Prejudiced By The Denial Of His Motion To Sever Counts Eleven Through Sixteen.

Frank claims that he was prejudiced by the District Court's denial of his motion to sever Counts Eleven through Sixteen.* The claim is frivolous and should be rejected.

It is well-settled that a motion to sever is addressed to the sound discretion of the Court, *United States* v. *Peden*, 472 F.2d 583, 584 (2d Cir. 1973); *United States* v. *Calabro*, 467 F.2d 973, 987 (2d Cir.), *cert. denied*, 410 U.S. 926 (1972); *United States* v. *Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972), and will not be disturbed on appeal except for clear abuse. *United States* v. *Jenkins*, 496 F.2d 57 (2d Cir. 1974); *United States* v. *Projansky*, *supra*, 465 F.2d at 138. On appeal, the defendant must show *substantial* prejudice as a result of the joinder, not merely a better chance of acquittal if separate trials were had. *United States* v. *Papadakis*, 510 F.2d 287, 297 (2d Cir. 1975); *United States* v. *Borrelli*, 435 F.2d 500, 502 (2d Cir.), *cert. denied*, 401 U.S. 946 (1970). No such prejudice has been shown here.

Stoller's testimony before the SEC as reflected in Counts Fourteen and Sixteen was inextricably related to evidence of the conspiracy and substantive counts. Count Fourteen dealt with Stoller denying that he knew that anyone had TWP stock. The evidence showed he had lied because the "cross" of TWP stock was made to Bonavia on March 11, 1969, and Stoller knew that as of June 20, 1969, Bonavia still had TWP stock. Furthermore, Stoller claimed that he had no further connection with TWP after he allegedly

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* Counts Eleven through Fourteen and Count Fifteen were dismissed at the close of the Government's case.

sold his 5,000 shares to Bank Hofmann. The evidence overwhelmingly established that he had lied.

Count Sixteen dealt with Stoller's denial that he had knowledge of D'Onofrio ever owning any TWP stock. Clearly, there was a commonality of proof of the conspiracy and false statement crimes which permitted joinder under Fed. R. Crim. P. 8(a) as to Stoller. *United States* v. *Carson*, 464 F.2d 424, 436 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States* v. *Sweig*, 441 F.2d 114, 118-119 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971). Even assuming that joinder was not permissible, the Government could have introduced the SEC testimony against Stoller as false exculpatory statements. *United States* v. *Tropiano*, 418 F.2d 1069, 1080-1081 (2d Cir. 1969), *cert. denied*, as *Grasso* v. *United States*, 397 U.S. 1021 (1970); *United States* v. *Corallo*, 413 F.2d 1306, 1327-1328 (2d Cir. 1969); *United States* v. *Smolin*, 182 F.2d 782, 785-786 (2d Cir. 1950). Where the evidence on one count would be admissible at a separate trial on the other counts, there can be no showing of prejudice that would justify a severance, *United States* v. *Sweig*, *supra*.

The remedy therefore to avoid prejudice to Frank was to instruct the jury that the evidence on Counts Fourteen and Sixteen was admissible only against Stoller. *United States* v. *Blumenthal*, 332 U.S. 539, 559-560 (1947); *United States* v. *Corallo*, *supra*, 413 F.2d at 1327-1328; *United States* v. *Tropiano*, *supra*, 418 F.2d at 1080-1081; *United States* v. *Verra*, 203 F. Supp. 87, 90-91 (S.D.N.Y. 1962) (Weinfeld, *J.*).

The record shows that Judge Tyler more than adequately instructed the jury when the SEC testimony of Stoller (GX 10.) was introduced into evidence (Tr. 1871-72) and when the Court charged the jury (Tr. 3507-14) that the SEC testimony related solely to Stoller and Counts Fourteen and Sixteen. Frank's claim that the jury could not consider Counts Fourteen and Sixteen without prejudice to Frank is sheer speculation and has no basis in fact.

POINT VII

Frank Was Neither Surprised Nor Prejudiced By The Government's Summation Or The Court's Instructions On Count Two.

Frank claims that the Government's summation and the District Court's charge altered, to his prejudice, the Government's theory of the entire case.* Frank's claim, which is advanced despite of his acquittal on Count Two and the overwhelming evidence supporting his conviction under the conspiracy count is frivolous and should be rejected.

Count Two of the indictment charges, in substance, fraud in the offer and sale of the securities of TWP in violation of Title 15, United States Code, Section 77q(a).**

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* Frank's principle claim that he was not informed of the Government's theory case in the Bill of Particulars is frivolous inasmuch as disclosure of the Government's theory is not properly a part of the Bill. *United States* v. *Lebron*, 222 F.2d 531, 535-536 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955); *United States* v. *Kushner*, 135 F.2d 668, 673 (2d Cir.), *cert. denied*, 320 U.S. 212 (1943).

** Title 15, United States Code, Section 77q(a) reads as follows:

> Sec. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Count One of the indictment charged Frank with participating in a conspiracy having three objects: (1) fraud in the offer and sale of TWP securities,* (2) fraud in connection with the purchase and sale of TWP securities,** and using the mails to commit fraud.***

Count Two does not charge manipulative activities, but is confined, among other things, to the "obtain[ing] of money or property by means of any untrue statement of a material fact or any omission to state a material fact. . . ." Frank and Stoller argued at the close of the Government's case that the indictment charged a manipulation of TWP securities and that the government failed to prove a manipulation (Tr. 2201-17). Concededly, there was no proof of a manipulation with respect to Count Two. However, it was not necessary to prove a manipulation because Count Two never charged a manipulation. On the contrary, Count Two charged Frank and his co-defendants, with among other things, omitting to state material facts. Frank claims that the "defense was seeking to destroy" a charge of manipulation (Supp. Br. 3).**** That may be so, but their attempt was directed at a charge that was neither alleged nor proved by the Government.

Frank's claim that he was "surprised" at the Government's summation is ridiculous. Frank knew at the close of the Government's case on October 1, 1974, over two weeks prior to the Government's summation on October 15 and 16, 1974, that the Government was alleging that Count Two charged the defendant with omissions of material facts particularly with Stoller, Allen and D'Onofrio being undisclosed underwriters. (Tr. 2219-21). Furthermore, the Government's evidence was amply sufficient to alert the defendants to the prosecution's theory of criminal

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* Count Two.

** Counts Three through Six.

*** Counts Seven through Ten.

**** "Supp. Br." refers to Frank's Supplementary Brief.

liability under Count Two. Thus, the Government's first two witnesses Ruth Appleton and Bruce Rich, called on September 9, 1974 were asked a number of questions dealing with Regulation A offerings and underwriters and the procedure involved in filing Regulation A offering circulars with the SEC. Indeed, there was reference to review by the SEC of the Regulation A filings to determine if there was adequate disclosure of material information (Tr. 61).*

Even assuming *arguendo* that Frank was "surprised" by the Government's theory on Count Two, he does not claim (1) surprise with respect to the Government's theory concerning the two other objects of the conspiracy or (2) the sufficiency of the proof supporting those charges. "Where a conspiracy has multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that an appellant agreed to accomplish at least one of the criminal objectives. *United States* v. *Papadakis*, 510 F.2d 287, 297 (2d Cir. 1975); *United States* v. *Grizaffi*, 471 F.2d 69, 73 (7th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973); *United States* v. *Tanner*, 471 F.2d 128, 140 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States* v. *Mack*, 112 F.2d 290, 291 (2d Cir. 1940). In the instant case, the evidence was overwhelming that Frank conspired to violate Title 15, United States Code, 78j(b), which charged fraud in connection with the purchase and sale of TWP securities and Title 18, United States Code, Section 1341, which charged mail fraud. Frank knew that Stoller, Allen and

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* The Government repeatedly attempted to elicit from Appleton testimony relating to what information is required to be contained in a Regulation A offering circular. Appleton it should be noted was called as an expert on administrative procedures relating to the filing of Regulation A offerings inasmuch as she was the Chief of the SEC Regulation A section. Defense counsel repeatedly objected to her testimony which testimony had the Government been permitted to elicit from her would have borne directly on the issue Frank now raises and would have clearly defined the parameters of the Government's theory on Count Two of the indictment (Tr. 56, 58-66).

D'Onofrio were going to "blow-off" the stock to Bonavia and Weissinger; he knew that the phony notary was to be used to persuade Emanuel Deetjen & Co. to transfer the 14,900 shares from nominee names to "street name;" and he knew that Stoller, Allen and D'Onofrio had substantially reduced the float of TWP by acquiring the 14,900 shares in nominee names. In sum, he knew and conspired with Stoller, Allen and D'Onofrio to commit securities fraud and mail fraud.

POINT VIII

Frank's Claim That There Was No Jurisdiction Is Frivolous.

Frank's claim that "they may well be a jurisdictional question" is frivolous. We fail to see how the use of a foreign facility (here, Bank Hofmann) to effectuate a conspiracy to defraud United States investors and artifically inflate the price of securities of American corporations traded in domestic markets raises a jurisdictional issue when that conspiracy is principally formulated and carried out in the United States.

Here TWP was a United States corporation, whose shares were traded over-the-counter in the Southern District of New York and *all* of the investors who purchased TWP, namely the customers of Hyman, Paruch and Goldinher resided in the United States and purchased the stock in the Southern District of New York. Additionally, Frank neglects to point out that every meeting and telephone conversation he participated in in furtherance of the conspiracy occurred in his offices at 144 E. 44th Street, New York, New York.

Even *assuming* Chief Judge Whipple's opinion, on which Frank relies, is relevant, that opinion holds that there is federal jurisdiction if there is an "impact on domestic investors or securities markets." The evidence of such an impact in the record before this Court is beyond dispute.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF NEW YORK } SS

IRA LEE SORKIN being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 2nd day of May, 1975, he served a copy of the within

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by placing the same in a properly franked envelope addressed to:

Irving Anolik, Esq.
225 Broadway,
New York, NY

And deponent further says that he sealed the said envelope and placed the same in the mail ~~chute~~ box ~~drop~~ outside of for mailing ~~in~~ the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Ira Lee Sorkin

Sworn to before me this

2nd day of May, 19 75

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. [illegible]
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977